University of Cape Town
School for Advanced Legal Studies

Masters Dissertation in International Public Law
PBL627W

Creating legal blackholes?
Terrorism and detention without trial:
towards a changing rule in international law?

Name: Martin Kunschak
Student No: KNSMAR003
Degree: MPhil LAWM02 in International Law

Supervisor: Cathy Powell

Research Dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the *MPhil* in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of *MPhil* dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Table of Contents

'[Y]ou are imprisoning a man when he has not broken any written law, or when you cannot be sure of proving beyond reasonable doubt that he has done so. You are restricting his liberty, and making him suffer materially and spiritually, for what you think he intends to do, or is trying to do, or for what you believe he has done. Few things are more dangerous to the freedom of a society than that.'[1]

Julius K Nyerere

'There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, to the freedom of the individual.'[2]

Hosni Mubarak, President of Egypt, December 2001

[1] Nyerere *Freedom and unity: Uhuru na umoja: a selection from writings and speeches, 1952-65* (1967) 312.
[2] Cited in Human Rights Watch *In the name of counter-terrorism: human rights abuses worldwide*, A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights March 25 (2003) 12.

1. Introduction

Much has been written on the infringement of civil liberties in the wake of the terrorist attacks on the USA in 2001. Unsurprisingly, the biggest amount of literature can be found about the measures advanced by the USA. Commentators explained, defended or condemned the steps taken and tried to prove their effectiveness or inadequacy. However, hardly any attention has been paid to another important aspect touching on general international law and international human rights law in particular:[3] What is the effect of counter-terrorist actions on existing rules of human rights law when these actions violate these norms? Could they possibly create a new rule?

The thesis will look at this neglected aspect of the 'war on terrorism' with focus on the troublesome practice of designating persons terrorists and detaining them without trial. A look at the current state of international law reveals that such detention without trial is prohibited under human rights law and humanitarian law. Nevertheless, states across the world have adopted this 'crown jewel of [e]mergency measures'.[4] The question of how states justify their approach in order to get around the prohibition arises. And could the practice together with its justification provide the basis for the emergence of a new rule of international law?

The approach taken in this thesis will firstly establish the existing rules, secondly examine state practice in contravention of the existing rules and thirdly analyse the effect of this contravention on the existing rules.

The first part will look at the rights of 'terrorists' with regard to detention without trial. For a start, detention without trial is defined briefly and the problems caused by this practice are identified. Then, relevant norms of human rights and humanitarian law

[3] Cf Roberts 'Righting wrongs or wronging rights? The United States and human rights post-September 11' (2004) 15 *European J of International L* 721.
[4] Hor 'Law and terror: Singapore stories and Malaysian dilemmas' in Ramraj, Hor and Roach *Global anti-terrorism law and policy* (2005) 277.

are highlighted to establish the existing rules regarding detention without trial and terrorism. Only norms of binding force will be considered, because non-binding soft-law cannot be breached and therefore is irrelevant for the examination of this thesis.

The second part examines the post 9/11-approaches of three states. According to the maxim 'watch the ones who care',[5] these include the USA and the UK as the two leading powers in the 'war on terrorism' and Israel which has always been under heavy 'terrorist fire'. The approaches are analyzed in terms of what legislation was adopted and what actually happened. Following this analysis the justification of the practice is highlighted to see how states tried to circumvent conflicting norms of international law. Finally, the judiciary's view is scrutinised, because this branch of government states what the law is. Judgments may reinforce or contradict the *opinio iuris* expressed by the executive. The case studies are complemented by a brief survey of other states practices.

The repeated disregard for existing rules may give rise to change in international law. Therefore, the third and last part focuses on the possibility that state practice together with its justification might foster the emergence of a new or altered rule of international law. After revisiting mechanisms of creation and change of norms in customary international law, the particular effects of the detention practices are discussed. Other governments' as well as courts' reactions are given account in order to determine whether a potential change of rule has been effected.

[5] *North Sea Continental Shelf Cases (FR Germany v Denmark and the Netherlands)* 1969 ICJ Rep 43. Cf also Stern 'Custom at the heart of international law' (2001) 11 *Duke J of Comparative and International L* 103.

2. Detention without trial and rights of 'terrorists'

This chapter provides the basis for the following examination. First, it is necessary to reach a working definition of what is meant by detention without trial. Closely connected are the problems raised by this practice. Following this theoretical groundwork the international law on detention without trial is established. For this purpose, universal, regional and customary norms of international human rights law are scrutinized, followed by norms of international humanitarian law.

A definition of terrorism will not be attempted. Firstly, states still struggle to find a common denominator regarding a legal definition of terrorism, since it is a highly political term and an attempt to define terrorism could fill a thesis on its own.[6] Secondly, a general definition is not necessary within the purpose of this thesis, because it suffices to consider how individual states define 'terrorists'. Hence, domestic approaches will be looked at briefly in the case studies.

2.1. Definition

Detention without trial is also referred to as administrative detention or preventive detention.[7] The concept is defined in various ways that do not differ significantly.[8] However, to clarify what the thesis is dealing with, salient features are highlighted to illustrate the general understanding of such detention. Detention without trial is basically defined by three elements: What act is committed, who commits it and why is it committed?

---

[6] See for an attempt of definition Cassese 'Terrorism as an international crime' in Bianchi *Enforcing international law against terrorism* (2004) 213-225.

[7] Gross 'Human rights, terrorism and the problem of administrative detention in Israel: does a democracy have the right to hold terrorists as bargaining chips?' (2001) 18 *Arizona J of International and Comparative L* 752. See also Ncube 'Investigative detention distinguished from preventive detention: a distinction without a difference?' (1987) 5 *Zimbabwe LR* 247 and Peter 'Incarcerating the innocent: preventive detention in Tanzania' (1997) 19 *Human Rights Q* 114.

[8] Cook 'Preventive detention – international standards and the protection of the individual' in Frankowski and Shelton (eds) *Preventive detention: a comparative and international law perspective* (1992) 1. See also Peter (1997) 114-15, Ncube (1987) 247 and Mahomed 'Preventive detention and the rule of law' (1989) 106 *SALJ* 550.

The first element comprises the deprivation of an individual's right to personal liberty,[9] that is a person is locked up by the state. This may happen in a normal prison or in special detention facilities. The term 'detention' covers any state of deprivation of liberty, regardless of whether this was due to an arrest (custody, pre-trial detention), a conviction, abduction or any other act by the state.[10]

Secondly, the executive is usually the sole actor. This means that the governmental branch of state power decides whether to detain.[11] Such a decision is regularly rendered by high level executive officials such as the head of government or a minister. Furthermore, the executive also carries out the detention and decides on the release of the detainee. Hence, there is no trial or judicial oversight in the first place.

Thirdly, usually no allegation of an offence is made, nor does an intention to charge, prosecute or punish the detainee exist.[12] The *bona fide* rationale is to prevent an individual from doing harm to society and to avert the perceived threat posed by the person.[13] It is a precautionary or anticipatory measure rather than punishment.[14]

The perceived threat to the public may be due to various reasons, such as mental illness, vagrancy, illegal immigration or the spreading of infectious diseases.[15] This thesis, however, will only deal with the potential danger created by persons suspected of involvement in terrorist activities. Hence, the practice which is reviewed here consists of the recent practice of labelling persons 'terrorists' and detaining them at the executive's discretion. Persons need not necessarily be expressly called 'terrorists' to fall under this category. What is decisive is that the danger they pose is determined in

---

[9] Cook (1992) 1.
[10] Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (1993) 169.
[11] Peter (1997) 114-15.
[12] Gross (2001) 753 and Ncube (1987) 247.
[13] Jayawickrama *The judicial application of human rights law: national, regional and international jurisprudence* (2002) 400.
[14] See Jayawickrama (2002) 400 and Gross (2001) 752.
[15] Cf Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, Rome, 4.XI 1950, *European Treaty Series* No 5 (EuCHR) art 5(e) and (f). See also Cook (1992) 1.

connection with the current 'war against terrorism', thus covering also constructs such as 'special interest detainees'[16] as well as 'illegal combatants'.[17]

2.2. The problem of detention without trial

From a human rights perspective, the practice of detention without trial raises several serious concerns. The main problem of such administrative or preventive detention is the very grave encroachment on fundamental personal liberty without an objective test of the reasons therefore, namely the 'dangerousness' or potential threat.[18] Failing a trial, which is bound to establish an objective 'truth' as far as possible, detention rather hinges on the highly subjective assessment of one or a few executive officials. Depending on the particular regime in place, detention may be based on reasonable suspicion that needs to be justified *a posterior*,[19] but may also be based on mere instinct or opinion that cannot be challenged at all.[20]

The highly subjective nature of such detention is aggravated by the fact that the decision maker – that is the executive official in charge – has a strong interest in the case, unlike a neutral and unbiased judge.[21] The executive's interest lies in public or state security rather than in the rights of particular individuals, especially in times of crisis. Abuse and careless usage of administrative detention are fostered by administrative convenience and political advantages, for example creating the public impression of acting against the problem of terrorism determinedly.[22]

From a victim's perspective, detention without trial causes serious concern with regard to the principle of legality. The executive's power to detain might be granted by

---

[16] US Department of Justice, Office of the Inspector General *The September 11 detainees: a review of the treatment of aliens held on immigration charges in connection with the investigation of the September 11 attacks* Special Report, (2003) 5.
[17] See Israel's Incarceration of Unlawful Combatants law, 5762-2002 art 2.
[18] Mahomed (1989) 550.
[19] Jayawickrama (2002) 400-01.
[20] Peter (1997) 115 and Cook (1992) 11.
[21] Cf Mahomed (1989) 550.
[22] Cf Heymann *Terrorism, freedom and security* (2003) 94-95. See also Franck 'Criminals, combatants, or what? An examination of the role of law in responding to the threat of terror' (2004) 98 *American J of International L* 686-87 and Thomas 'Emergency and anti-terrorist powers: 9/11: USA and UK' (2003) 26 *Fordham International LJ* 1196.

statutory provisions rendering it perfectly legal in the first place.[23] The prerequisites authorizing detention are generally couched in broad and vague terms like 'national security' while it is up to the executive official in charge to fill this gap by way of a subjective finding.[24] As long as an objective finding of breach of law is not necessary, it is difficult if not impossible for individuals to determine what behaviour will keep them out of jail with certainty.[25] This lack of predictability promotes arbitrariness and contradicts the basic principles of legality and certainty of law (*Rechtssicherheit*).[26] Illustrating in this regard is the 'little old Swiss lady example' whereby the US government acknowledged that '[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance Al Qaeda activities' might be subject to detention as an 'enemy combatant'.[27] A person teaching the son of an *Al Qaeda* member English would likewise be eligible for such detention.[28]

Not only arbitrariness distinguishes detention without trial from criminal arrest. There is also a significant difference in the duration of confinement. While the period of imprisonment that has to be served after conviction is determined and known to the prisoner, administrative detention is often indefinite.[29] This situation of indeterminacy tends to have strong detrimental effects on the health and psyche of detainees.[30] Furthermore, the prospect of being detained indefinitely at the whim of some state

---

[23] Gross (2001) 773.
[24] Gross (2001) 773 and Cook (1992) 11.
[25] Cf Mahomed (1989) 551.
[26] The European Court of Human rights (EurCtHR) stated that 'a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able--if need be with appropriate advice--to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty.' See *Sunday Times v UK* (1979-80) 2 EHRR 245, 271. See also Dinstein 'The right to life, physical integrity, and liberty' in Henkin (ed) *The International Bill of Rights: the Covenant on Civil and Political Rights* (1981) 129-30.
[27] *In re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 475 (D DC 2005). See also Martinez 'Detention of suspected terrorists: balancing security and human rights' (2004) Research paper, Stanford Law School 6.
[28] *In re Guantanamo Detainee Cases*, 355 F Supp 2d 475.
[29] Gross (2001) 753.
[30] Cf *G v Secretary of State for the Home Department* [2004] 1 WLR 1349, 1352. See also Walker 'Prisoners of war all the time' (2005) 10 *European Human Rights LR* 69-70.

officials may rightly be interpreted as a violation of human dignity and some sort of inhuman and degrading treatment if not torture.

The uncertainty surrounding such detentions is not only in itself a violation of human dignity, but also puts detainees in an especially vulnerable position.[31] Detainees who are left in a legal limbo are often exposed to harsh conditions and ill-treatment.[32] The lack of judicial control and oversight facilitates abuse by guards and fellow inmates alike, especially when detainees are stigmatized as threats to national security in times of crisis.[33] Ill-treatment of detainees is furthermore employed as an interrogation technique, especially in the context of terrorism, with not only the detainee's dignity at stake, but also his mere survival.[34] The problem is far from confined to ill-reputed countries only, but exists also in the world's most developed democracies.[35]

2.3. International human rights norms on detention without trial

The practice of detaining persons without trial described above interferes with one of the oldest human rights in history, the right to personal liberty.[36] This right features in the array of rights protecting the individual against the state (*Abwehrrechte*). These rights put states under a negative obligation not to engage in proscribed conduct. They are also known as human rights of the first generation.

---

[31] Rieter 'ICCPR Case law on detention, the prohibition of cruel treatment and some issues pertaining to the death row phenomenon' (2002) 1 *J of the Institute of Justice & International Studies* 86 and Cook (1992) 1.

[32] Cf Warbrick 'The European response to terrorism in age of human rights' (2004) 15 *European J of International L* 1015.

[33] See for example Human Rights Watch *Presumption of guilt: human rights abuses of post-September 11 detainees* (2002b) HRW Report Vol 14 No 4 (G) 67-84.

[34] Neuman 'Comment, counter-terrorist operations and the rule of law' (2004) 15 *European J of International L* 1024-25.

[35] Flynn 'Counter-terrorism and human rights: the view from the United Nations' (2005) 10 *European Human Rights LR* 40-42. Cf also Rieter (2002) 83 and Human Rights Watch (2002b) 73-78.

[36] The right to personal liberty goes back to the Magna Charta Libertatum of 1215. See Nowak (1993) 159, Dinstein (1981) 136 and Smith *Textbook on international human rights* (2005) 240.

2.3.1. Universal human rights law on detention: the ICCPR

The major universal human rights treaty dealing with first generation rights is the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR).[37] As a treaty it unfolds binding force towards its member states. Currently, 155 states are party to the ICCPR.[38]

The relevant substantive provision can be found in art 9 protecting the individual's 'right to liberty and security of the person'.[39] Liberty in this context must be interpreted narrowly delineating mere physical freedom,[40] or freedom from 'forceful detention […] at a certain, narrowly bounded location'.[41] Hence, the right provides for a defence against being taken out of ordinary life and locked up in some confined area by the state.

The right to liberty, however, is not absolute. Rather, curtailing this right is absolutely necessary for any society to function properly, because it presents the most important sanction for misbehaviour and non-conformity with the law.[42] Given the progressive abandonment of the death penalty and of corporal punishment, the importance of imprisonment as punitive measure is on its way to becoming the solitary criminal punishment.[43]

Because criminal procedure depends heavily on the deprivation of liberty, the right to liberty is subject to limitations allowing states to infringe this 'freedom of freedom'.[44] However, the deprivation of physical liberty is a grave encroachment, which strongly entails the danger of mistakes or abuse.[45] Therefore, two important

---

[37] 6 *ILM* 368, entered into force 23 March 1976.
[38] See http://www.ohchr.org/english/countries/ratification/4.htm, updated 26 January 2006 (accessed 12 February 2006).
[39] Art 9(1).
[40] Dinstein (1981) 128.
[41] Nowak (1993) 160.
[42] Dinstein (1981) 128-29.
[43] Apart from fines. See Nowak (1993) 159.
[44] Dinstein (1981) 128.
[45] Mahomed (1989) 550-52.

safeguards must be adhered to in order to comply with treaty obligations under the ICCPR.

The first and less onerous condition requires the lawfulness of the deprivation.[46] Detention must be based on a pre-existing domestic legal norm, which establishes both the reason and the procedure for such detention.[47] This limitation is owed to the basic principle of *nulla poena/crimen sine lege*, even though art 9(1) applies not only to criminal procedure but to all deprivations of liberty.[48]

Lawfulness is closely connected to the principles of certainty and predictability. The norms must be understandable and accessible to allow individuals to foresee which conduct will lead to detention.[49] Furthermore, 'law' must be interpreted in a strict sense of a general-abstract norm derived from the domestic legislative process or unwritten common law.[50] It is questionable whether administrative orders or regulations satisfy the requirement of being 'law'.[51] At least, they raise doubts about accessibility and, what is more, about the second condition of permissible deprivation of liberty: the prohibition of arbitrariness.

According to the more onerous restriction, arrest or detention must not be arbitrary.[52] The prohibition of arbitrariness qualifies the positivistic condition of simply having a law which authorizes detention in given circumstances.[53] The underlying law as well as its enforcement must not be arbitrary.[54] The Human Rights

---

[46] ICCPR art 9(1).
[47] Nowak (1993) 171 and Dinstein (1981) 130.
[48] Human Rights Committee, General Comment No 8, Article 9, UN Doc HRI\GEN\1\Rev.1 at 8 (1994) para 1.
[49] Cf Nowak (1993) 171-72.
[50] Nowak (1993) 171.
[51] Cf Nowak (1993) 171, who argues that a systematic interpretation of the word 'law' in the Covenant excludes administrative provisions. Dinstein (1981) 129, however, comes to the opposite conclusion while looking at the generic meaning of the term 'law'.
[52] ICCPR art 9(1).
[53] In a strict sense, despotic laws invoked by the Nazi regime were completely legal and could have been justified under the condition of lawfulness. Cf Hassan 'The word "arbitrary" as used in the Universal Declaration of Human Rights: "illegal" or "unjust"?' (1969) 10 *Harvard International LJ* 237.
[54] Nowak (1993) 172.

Committee (HRC) specified that detention is arbitrary when it is unjust, inappropriate, unpredictable, unnecessary, unreasonable[55] or unproportional.[56]

While it is often difficult to determine whether this 'international minimum standard'[57] has been violated in practice, the HRC makes its findings on review of the context and circumstances of each case brought before it. For example, the HRC found detentions arbitrary in cases of kidnappings or disappearances of persons[58] and where persons were detained because they exercised other human rights such as freedom of expression, religion and consciousness.[59] Particularly interesting for the purpose of this paper are the HRC's findings of arbitrariness in cases of detention without charges[60] or without warrant.[61] Furthermore, Peru was criticized for allowing preventive detention in connection with terrorism for up to 15 days, which raised 'serious issues with regard to article 9' of the ICCPR.[62]

Art 9 further introduces several procedural rights to protect from arbitrary detention. Firstly, the detainee must be informed of the reasons for his or her arrest.[63] This duty applies to criminal cases as well as preventive detention.[64] The information must be given immediately at the time of the arrest, but, in cases of the latter, it is sufficient that the information is of a more general nature.[65] While the reasons need not be legally founded in the first place, they must not, on the other hand, lack

---

[55] See for the first five *Hugo van Alphen v The Netherlands*, No 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990) para 5.8. The Human Rights Committee stated in this case that detention would be reasonable if it was necessary to prevent flight, interference with evidence or the recurrence of the crime.
[56] *A v Australia,* No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) para 9.4, where an illegal immigrant's detention for four years was held to be arbitrary because this period was unproportional.
[57] Dinstein (1981) 130.
[58] *Delia Saldias de Lopez v Uruguay*, No 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984) para 13 and *Lilian Celiberti de Casariego v Uruguay*, No 56/1979, UN Doc CCPR/C/OP/1 at 92 (1984) para 11.
[59] *Monja Jaona v Madagascar*, No 132/1982, UN Doc CCPR/C/OP/2 at 161 (1990) para 14.
[60] *Daniel Monguya Mbenge v Zaire*, No 16/1977, UN Doc CCPR/C/OP/2 at 76 (1990) para 20.
[61] *Hiber Conteris v Uruguay*, No 139/1983, UN Doc CCPR/C/OP/2 at 168 (1990) para 10.
[62] Concluding observations of the Human Rights Committee: Peru (25/07/96), UN Doc CCPR/C/79/Add.67; A/51/40 para 356.
[63] ICCPR art 9(2).
[64] Human Rights Committee, General Comment No 8 para 4.
[65] Nowak (1993) 175.

substance – it is, for example, insufficient when it is solely referred to the legal basis of the arrest.[66]

Subsequently, the detainee must receive specific legal information regarding the grounds of the detention order promptly.[67] Although in cases of administrative detention no criminal charges are brought, the specific acts or threats that are alleged must be specified in each case rather than stating simply a threat to society or national security in general.[68] The duty to inform should prevent a '*Kafkaesque*'[69] situation all too common to detention without trial in which the individual faces state power taking his liberty without knowing why.

The right to prompt and specific information is also essential for the second procedural safeguard, the right to judicial review without delay.[70] This right resembles the Anglo-American right of *habeas corpus* and the Hispanic right of *amparo*.[71] It is of special significance in cases of detention without trial as it provides an objective test of the procedural lawfulness as well as the reasonableness of executive orders, which tend to be rather subjective in nature.[72] In fact, the right to judicial review applies only to cases of detention without trial, because a court order for detention satisfies the requirement of judicial review.[73]

A court may be called a court in this regard, when it fulfils the criteria of independence from the parties and impartiality.[74] The former criterion aims at the separation of powers and demands that the judicial authority is neither subject to the

---

[66] *Adolfo Drescher Caldas v Uruguay*, No 43/1979, UN Doc CCPR/C/OP/2 at 80 (1990) para 13.2. See also Nowak (1993) 175.
[67] Jayawickrama (2002) 401-02 and Nowak (1993) 175. According to Nowak 'promptly' means during the first interrogation at the latest.
[68] Jayawickrama (2002) 402.
[69] Dinstein (1981) 131.
[70] ICCPR art 9(4). The time elapsing until review proceedings commence should not exceed a few weeks. Cf *Paul Kelly v Jamaica*, No 253/1987, UN Doc CCPR/C/41/D/253/1987 at 60 (1991) para 5.6, where the Human Rights Committee found 5 weeks as exceeding due time. Cf also Nowak (1993) 179.
[71] See on the right of *amparo* Camargo 'The claim of "*amparo*" in Mexico: constitutional protection of human rights' (1969-1970) 6 *California Western LR* 201.
[72] Jayawickrama (2002) 416.
[73] Dinstein (1981) 134-35.
[74] Jayawickrama (2002) 420 and Nowak (1993) 244-46.

executive in appointment or impeachment, nor subject to executive directives.[75] Hence, military tribunals or other specially appointed courts raise serious concerns. The latter criterion requires a court to be neutral and unbiased in his judgment, which might be jeopardized in highly politicized cases involving terrorism.

Furthermore, a court must be competent to order the release of the detainee if it deems detention unlawful or unreasonable.[76] Formal review powers which confine the court to monitoring compliance with domestic law are not sufficient.[77] That would be the case when the court's power is limited to an assessment of whether an individual is a 'designated person' within the meaning of some domestic law. Rather, the court must be entitled to release a person when it determines that detention violates other national or international norms, such as art 9 of the ICCPR.[78]

Another procedural safeguard is the right to compensation in cases of unlawful detention.[79] This is somewhat different as it applies after the fact and provides a disincentive for the state rather than immediate protection for the individual.[80] What it can do is to ameliorate injustices suffered and rehabilitate the detainee.

The right to liberty, however, must be distinguished from the right to security provided for in art 9(1), since the latter obliges the state to take appropriate and reasonable positive action to protect individuals from private interference with their rights to life and personal integrity.[81] It is, however, unclear where this obligation ends. A state cannot possibly control any private action and cannot therefore protect the individual from any threat.[82]

---

[75] Nowak (1993) 245-46.
[76] Jayawickrama (2002) 421.
[77] *A v Australia* (1997), para 9.5.
[78] *A v Australia* (1997), para 9.5. See also Jayawickrama (2002) 423.
[79] ICCPR art 9(5).
[80] Nowak (1993) 180.
[81] *William Eduardo Delgado Páez v Colombia*, No 195/1985, UN Doc CCPR/C/39/D/195/1985 (1990) para 5.5. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44.
[82] In *Carmichele* the South African Supreme Court found the state liable in a case of negligent failure to protect a citizen from a particular known threat, posed by by a man who was awaiting trial for having

This problem is particularly interesting from a counterterrorism perspective. Art 9(1) of the ICCPR might be interpreted as containing a conflict of norms: states need to infringe the right to personal liberty to meet their obligation to protect the right to security of the person from private terrorist actors.[83] Such interpretation is, however, not tenable. Firstly, the obligation to act arises in specific cases of known threats to life and personal integrity only, rather than to oblige the state to protect from any abstract and general dangers.[84] Even if it were so, the infringement of the right to personal liberty in contradiction to art 9 can hardly be seen as appropriate or reasonable measure as rights should be protected within the human rights framework and not at the expense of one another.[85]

2.3.2. Regional human rights norms on detention without trial

The preservation of human rights was also put on regional agendas, leading to the conclusion of regional human rights treaties. The provisions relating to detention without trial in these treaties are quite similar to art 9 of the ICCPR, although several differences need to be highlighted. Furthermore, regional human rights jurisprudence adds to an elaborated interpretation of rights.[86]

The most advanced regional treaty is without a doubt the European Convention (EuCHR).[87] Its art 5 differs insofar as it does not expressly prohibit arbitrariness, but enlists exhaustively cases of permissible deprivation of liberty which also need to be in accordance with a procedure prescribed by law.[88] The European Court of Human Rights (EurCtHR), however, made clear that detention is only lawful when it is in

---

attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail. See *Carmichele v Minister of Safety and Security* 2001 para 74.

[83] Cf Dickson 'Law versus terrorism: can law win?' (2005) 10 *European Human Rights LR* 12.

[84] *Delgado Páez v Colombia* (1990) para 5.5. Cf also Hoffman 'Human rights and terrorism' (2004) 26 *Human Rights Q* 950.

[85] Cf Hoffman (2004) 949.

[86] Especially the vast jurisprudence of the EurCtHR.

[87] See fn 15 above.

[88] EuCHR art 5(1). Permissible cases include imprisonment after conviction, non-compliance with court orders, pre-trial detention, educational supervision of minors, quarantine to prevent spreading of infectious diseases, detention of mentally-ill, alcoholics or vagrants and detention regarding illegal immigration.

strict compliance with domestic as well as with conventional law and, in addition, is not arbitrary.[89]

Of particular interest is art 5(1)c, which permits detention in order to prevent the committing of an offence. What may sound like preventive detention in the first place rather amounts to detention on remand, because detention must serve the purpose of bringing the detainee before the competent legal authority.[90] Art 5(3) particularly relates to detention under art 5(1)c and provides for prompt appearance before a judicial authority and the right to be tried within a reasonable time. Hence, detention without trial is proscribed under the European Convention.[91]

The rights to prompt information,[92] to judicial review[93] and to compensation[94] feature in this regional arrangement as well. They are shaped and interpreted like the procedural safeguards of the ICCPR.

The EurCtHR has confirmed that these protections also apply in cases of terrorism.[95] The court also confirmed that art 5(1)c aims at the prevention of concrete and specific crimes, and, hence, does not allow for preventive detention in a more general campaign.[96] In another terrorism-related case, the Court found it insufficient to base arrest and detention on the honest belief that the detainees were terrorists.[97] It

---

[89] *Winterwerp v The Netherlands* (1979-80) 2 EHRR 387, 405. See also Jacobs and White *The European convention on human rights* (1996) 80-81.
[90] EuCHR art 5(1)c. Such judicial authority may be an investigatorial judge ('juge d'instruction' or 'Untersuchungsrichter') who investigates and decides on the charges of the case in inquisitorial systems or a magistrate who decides on release or release on bail in accusatorial systems. See Jacobs and White (1996) 84-5.
[91] Cf Jacobs and White (1996) 85.
[92] Art 5(2) goes further than art 9(2) of the ICCPR in that information must be given in a language the arrested person understands.
[93] Art 5(4) providing for speedily decision of the lawfulness of the deprivation of liberty.
[94] Art 5(5) stipulates that the right shall be enforceable.
[95] *Lawless v UK* (1979-80) 1 EHRR 15, 33-34.
[96] *Guzzardi v Italy* (1981) 3 EHRR 333, 368 and *Ciulla v Italy* (1991) 13 EHRR 346, 356.See also Jacobs and White (1996) 86. In these cases the campaign was pursued to fight organized crime, namely the Mafia. By analogy, the above said also applies to campaigns against terrorism.
[97] *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, 169.

stated that the lack of an objective basis for such belief does not live up to the requirement of reasonable suspicion and, therefore, violates art 5 of the Convention.[98]

The American Convention on Human Rights (AmCHR)[99] resembles the provisions of the ICCPR and the EuCHR closely.[100] While the AmCHR provides for similar substantive (lawfulness and prohibition of arbitrariness) and procedural rights (information, judicial review) with regard to the deprivation of liberty,[101] it lacks the right to compensation. As has been said before, compensation is of minor significance for the immediate protection of persons caught in the claws of state power, because it applies after the fact.[102]

The African Charter on Human and Peoples' Rights (ACHPR)[103] is regarded as providing the least protection of the right to liberty. [104] The relevant provision does not mention expressly any of the procedural safeguards of the other instruments.[105] The procedural safeguards can only be inferred from art 6.[106]

A closer look, however, reveals that analogous rights are available under the African Convention.[107] Art 6 read in connection with art 7, which provides for the right to have one's cause heard and the right to appeal when fundamental rights are violated, points to the right of judicial review. Recognising international human rights standards, the African Commission for Human and Peoples' Rights made clear that detainees shall be informed of the reasons at the time of the arrest in an understandable

---

[98] *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 169.
[99] American Convention on Human Rights, 22 November 1969, 9 *ILM* 673, entered into force 18 July 1978.
[100] Apart from the exhaustive list of circumstances of permissible deprivation of liberty in the EuCHR.
[101] Art 7.
[102] See ch 2.3.1. above.
[103] African Charter on Human and Peoples' Rights, 27 June 1981, 21 *ILM* 58, entered into force on 21 October 1986.
[104] Freeman and Van Ert *International human rights law* (2004) 265. Cf also Rehman *International human rights law: a practical approach* (2003) 243-44.
[105] Art 6.
[106] Ouguergouz *The African charter of human and peoples' rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 120.
[107] Cf Ouguergouz (2003) 143.

language and be informed of any charges promptly.[108] Furthermore, they are entitled to be brought before judicial authority promptly and receive trial or release within reasonable time.[109] A right to compensation, however, is not envisaged.

In summary, the universal and regional treaties establish a fairly uniform minimum standard for the deprivation of liberty. This standard of due process consists of the substantive qualifications of lawfulness and non-arbitrariness, as well as procedural safeguards, namely, the rights to be informed, to challenge the deprivation and to have it tested by an independent and competent judicial authority. With a view to the practice of detention based on the decision of an executive organ, the right to have this decision reviewed by an independent adjudicative process is of particular importance. Judicial review limits the otherwise unfettered power to detain and helps preventing abusive and mistaken exercise of this power.

2.3.3. Derogation clauses

While states have a duty to fulfil their obligations under these human rights treaties, circumstances might arise where upholding certain rights may not be feasible. States should not be compelled to uphold all rights in situations of emergency, when this could cause their own demise.[110] With exception of the African Charter, the treaties provide for member states' right of derogation in a similar way.[111]

From a state perspective, derogation clauses acknowledge that *prima facie* violations may sometimes be necessary and at the same time allow the violator to stay within the legal framework. From a treaty perspective, derogation clauses strengthen authority, because they allow for exceptional non-observance of particular provisions, while they preserve the binding force of the treaty in general. Furthermore, keeping emergency measures within the treaty system and preserving norms' general integrity

---

[108] Resolution on the Right to Recourse and Fair Trial (1992) ACHPR /Res 4(XI)92.
[109] Resolution on the Right to Recourse and Fair Trial (1992) ACHPR /Res 4(XI)92.
[110] Dicey *Introduction to the study of the law of the constitution* (1959) 412-13. See also Dyzenhaus 'The state of emergency in legal theory' in Ramraj, Hor and Roach *Global anti-terrorism law and policy* (2005) 65.
[111] ICCPR art 4, EuCHR art 15 and AmCHR art 27. See also Oraá *Human rights in states of emergency in international law* (1992) 16.

obviates the emergence of new norms of customary nature which alter the given rights.[112]

Derogation, however, is linked to strict conditions. Firstly, a state of emergency must exist, which threatens the life of the nation.[113] Such an exceptional situation must threaten at least one of the constituent elements of the state, that is population, territory or political functioning.[114] This may *inter alia* encompass war,[115] rebellion, natural disasters, but also situations of terrorism.[116] Additionally, the emergency must be actual or imminent and affect the whole or at least large parts of the population.[117] Furthermore, the state of emergency is a strict temporary concept, thus proscribing permanent states of emergency.[118] Most constitutions permit the declaration of states of emergency solely for limited time periods.[119]

States are, however, not free to suspend whatever rights they choose, once such a narrowly drawn emergency becomes apparent. Rather, the second condition demands that the particular derogation and, in addition, the concrete measures taken are strictly required to overcome the situation of emergency,[120] which implies strict necessity, efficacy and proportionality. Furthermore, the various provisions stipulate consistency

---

[112] The possibility of emergency measures becoming the norm within the human rights framework is limited by strict conditions that have to be met.
[113] See for the insignificance of the different wording in the AmCHR Oraá *Human rights in states of emergency in international law* (1992) 16 and 32.
[114] Cf Oraá (1992) 33.
[115] While the EuCHR and the AmCHR explicitly refer to war, the ICCPR omits this reference. This omission is due to the fact that the UN system was created to eradicate the 'scourge of war' and the major human rights treaty should not have endowed 'war' with new legitimacy with explicitly recurring to it. There is, however, no doubt that a situation of 'war' may constitute a state of emergency under the ICCPR as well. See Oraá (1992) 12.
[116] For the qualification of terrorism as causing a state of emergency see *Lawless v UK* (1979-80) 1 EHRR 31-32.
[117] *Lawless v UK* (1979-80) 1 EHRR 32. See also *Aksoy v Turkey* (1997) 23 EHRR 553, 587, which recognized the possibility of a regional emergency.
[118] Oraá (1992) 30.
[119] Oraá (1992) 30.
[120] ICCPR art 4(1), EuCHR art 15(1) and AmCHR art 27(1).

with obligations under other international law instruments and proscribe the discriminatory exercise of emergency powers.[121]

While certain core rights are qualified as non-derogable, the right to liberty is not included.[122] However, the HRC emphasized that the prohibition on taking hostages, abduction and 'unacknowledged detention' may not be derogated from.[123] Furthermore, the HRC argued that fundamental rights of due process – such as judicial review of detention – are so essential for the preservation of non-derogable rights in times of crisis that they themselves become non-derogable.[124]

Finally, the treaties oblige the derogating state to notify the respective Secretary General immediately[125] of the suspended provisions and measures taken, the reasons therefore as well as the termination of emergency measures and derogations.[126] This duty to inform is owed to the transparency needed to verify the legality of the derogation. It also provides publicity to advance certainty of law (*Rechtssicherheit*) for the affected population.[127]

The African Charter, in contrast, makes no mention of a derogation clause. The African Commission for Human and Peoples' Rights concluded that, due to this

---

[121] On the ground of race, colour, sex, language, religion or social origin. See ICCPR art 4(1) and AmCHR art 27(1). With the EuCHR such prohibition can be inferred from art 14 which prohibits discrimination with regard to the Convention's rights more generally.
[122] For example the right to life, the prohibition of torture, slavery and the principle of non-retroactivity.
[123] Human Rights Committee, General Comment No 29 states of emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001) para 13(b).
[124] Human Rights Committee, General Comment No 29 paras 15 and 16. See also Hartman 'Working paper for the Committee of Experts on the article 4 derogation provision (1985) 7 *Human Rights Q* 118-120. AmCHR art 27(2) supports this contention as it provides for non-derogability of 'judicial guarantees essential for the protection of such [ie non-derogable] rights'.
[125] Which means without any avoidable delay. In the *Greek Case* a period of four months until notification was deemed in violation of EuCHR art 4(3), whereas in *Lawless* a delay of twelve days was found to comply with the requirement. See *Greek Case* Report of the European Commission of Human Rights (1969) 12 Yearbook of the European Convention on Human Rights 1, 42-43 and *Lawless v UK* (1979-80) 1 EHRR 36. See also Oraá (1992) 60-61.
[126] ICCPR art 4(3), EuCHR art 15(3) and AmCHR art 27(3).
[127] ICCPR art 4(1) points in that direction as it demands that the existence of a state of emergency must be officially proclaimed.

omission, derogation is not permissible whatever the circumstances are.[128] The African Charter, however, causes concerns due to the appearance of so-called 'claw back clauses' which permit states to impair rights by simply referring to domestic law.[129] Art 6 of the ACHPR provides that 'no one may be deprived of his freedom *except for reasons and conditions previously laid down by law*' [emphasis added].

2.3.4. International customary human rights law

While the human rights treaties bind only their signatories, they bear the potential of creating binding norms of international customary law, especially when their similarities are taken together.[130] The customary prohibition of arbitrary detention further rests on the *Universal Declaration of Human Rights*[131] and numerous national constitutions and court decisions.[132] Like in the treaties, detention is considered arbitrary in international customary law when it has no basis in law, when it is unjust and unreasonable, when proper information as to the charges is not provided and when there is a failure of judicial review.[133]

---

[128] *Amnesty International and Others v Sudan* (2000) African Human Rights LR 297 (ACHPR 1999) para 42 and para 79 which states that '*the restriction of human rights is not a solution to national difficulties*'. See also *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2000) African Human Rights LR 66 (ACHPR 1995) para 21. However, it has been contended that member states simply had no intention to regulate derogation. Hence, the ACHPR would permit derogation regulated by general principles of international law. See Ouguergouz (2003) 427 and 429-79.

[129] Rehman (2003) 238-39.

[130] As they are evidence of general state practice as well as *opinio iuris*, given the vast number o f ratifications. The ICCPR has currently 155 member states, see fn 38. The EuCHR has 46 member states, which encompasses all members of the Council of Europe, see http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (accessed on 12 February 2006). The AmCHR has been ratified by 23 out of 35 OAS member states, see http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DIL/treaties_and_agreements.htm(accessed on 12 February 2006). The ACHPR has 53 member states, ie all members of the African Union, see http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf (accessed on 12 February 2006).

[131] GA res 217A (III), UN Doc A/810 at 71 (1948).

[132] See *Alvarez-Machain v US*, 331 F 3d 604, 620-21 (9th Cir 2003) and . See also Bassiouni 'Human rights in the context of criminal justice: identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke J of Comparative & International L* 260-61 and American Law Institute *Restatement of the Law, Third, Foreign Relations Law of the United States* (1987) para 702. See also Henkin et al *Human rights* (1999) 349-355.

[133] *Alvarez-Machain v US* (2003) 621-22 and Henkin (1999) 352.

According to this universally accepted customary norm, detention is only permissible within the limits of due process. It is, however, questionable, whether these limits are also norms of peremptory international law (*ius cogens*).[134] The prohibition of arbitrary detention does not belong to the core of rights which are peremptory without any doubt.[135]

In contrast to ordinary customary norms, i*us cogens* norms cannot be derogated from by treaty and may only be altered by another norm of *ius cogens*.[136] The fact that three major human rights treaties allow for derogation of the respective provisions relating to arbitrary detention suggests that this prohibition cannot be classified as peremptory. This is even more so, since the derogation clauses are still far from obsolete at present.[137]

2.4. Detention of terrorist suspects and International Humanitarian Law

Following the terrorist attacks of 9/11, the US government was quick to declare a 'war' on terrorism.[138] While it is profoundly doubtful whether 'war' may be declared on a social phenomenon with more than just rhetorical significance,[139] there is no doubt that the 'war on terrorism' generated two international armed conflicts in Afghanistan and Iraq. The situation of armed conflict involves another set of rules for the protection of the individual. These are the rules of international humanitarian law, or *ius in bello*, which limit the conduct of states in times of war.

---

[134] It would follow from such a classification that states could not

[135] Such as the prohibition of genocide, slavery, murder as state policy and torture. Cf Restatement… Henkin (1999) 354 and Rehman (2003) 61.

[136] Vienna Convention on the Law of Treaties (1969) 8 *ILM* 679 art 53. See also American Law Institute (1987) para 102, comment (k), Brownlie *Principles of public international law* (2003) 597-98 and Freeman and Van Ert (2004) 163.

[137] See for example the recent derogation by the UK: Council of Europe 'United Kingdom derogation under Art.15 ECHR / Public Emergency after 11September 2001' (2001) 22 *Human Rights LJ* 465.

[138] President Bush 'Statement by the President in His Address to the Nation' 11 September 2001, available at www.whitehouse.gov/news/releases/2001/09/20010911-16.html (as of 24 January 2006). See also Joint resolution to authorize the use of United States armed forces against those responsible for the recent attacks launched against the United States, 18 September 2001, Pub L No 107-40, 115 Stat 224 (2001).

[139] Mégret '"War"? Legal Semantics and the Move to Violence' (2002) 13 *European J of International L* 362-64. See further Condorelli and Naqvi 'The war against terrorism and *ius in bello*: are the Geneva Conventions out of date?' in Bianchi *Enforcing international law against terrorism* (2004) 30-33.

2.4.1. The Geneva Conventions

The major codified basis of humanitarian law relevant to this thesis is found in the Geneva Conventions of 1949.[140] The Conventions are based on a dichotomy in status: persons are either combatants, who participate in hostilities actively, or they are non-combatants, who do not participate.[141] Each of the two groups is endowed with certain rights which protect them according to their status.[142]

The distinction is also apparent from the perspective of detention and deprivation of liberty. Combatants may be detained indefinitely as long as active hostilities are taking place.[143] They must, however, be awarded the status of prisoner-of war (POW). This status puts POWs under special protection, according to which they may not be punished for legal conduct of warfare.[144] Since they are not interned due to any wrongdoing in the first place, the purpose of detention is not to punish POWs, but to keep them away from fighting in the battlefield.[145]

This purpose also introduces a temporal element: POWs must be released and repatriated as soon as active hostilities end, because cessation of such hostilities eliminates the justification for detention.[146] Rapid termination is further warranted,

---

[140] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention III relative to the Treatment of Prisoners of War; Geneva Convention IV relative to the Protection of Civilian Persons in Time of War; signed 12 August 1949, entered into force 21 October 1950. 192 states are members to this treaty. See International Committee of the Red Cross (ICRC) 'States party to the Geneva Conventions and their Additional Protocols Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977' 12 April 2005.

[141] See Uhler and Coursier *Commentary: IV Geneva Convention* (1958) 51. See also Condorelli and Naqvi (2004) 35.

[142] See Geneva Convention III for the former and Geneva Convention IV for the latter.

[143] Geneva Convention III arts 21 and 118. See also Franck (2004) 686.

[144] Geneva Convention III art 99. See also Franck (2004) 686. See for the protection standards Geneva Convention III part II, providing *inter alia* for respectful and honourable treatment, internment in military camps and not in penitentiaries, exercise of religious and recreational activities and even monthly payment of POWs. POWs may be prosecuted and convicted subsequently for criminal offences under national or international law. See Geneva Convention III art 99. See also McDonald and Sullivan 'Rational interpretation in irrational times: the third Geneva Convention and the "war on terror"' (2003) 44 *Harvard International LJ* 314.

[145] Geneva Convention III art 118. See also De Preux *Commentary: III Geneva Convention* (1960) 546-47.

[146] De Preux (1960) 547.

because not only the conditions of internment are deemed harsh and painful, but also the situation of captivity itself.[147] From the perspective of the Geneva Conventions' general purpose of mitigating the hardships of war, art 118 aims at minimizing unnecessary detention of combatants.[148]

The Conventions were drafted from the perspective of conventional – world war II – warfare.[149] The 'war on terrorism' therefore raises two major problems regarding the detention of POWs. Firstly, termination of active hostilities could be determined quite easily in conventional wars.[150] Nowadays the end of armed conflicts is much harder to establish. In the case of the 'war on terrorism', this becomes virtually impossible, because this phenomenon can never be eradicated completely.[151] When could a victory possibly be celebrated?

The infiniteness potentially leads to the assumption that terrorist 'combatants' may be detained indefinitely, even if this may last for their whole life.[152] This assumption may be bolstered by the probability of such 'combatants' to take up arms again and re-engage in terrorist action.[153] Such an approach, taken together with its outcome, is, however, odd, given the Conventions' purpose to appease the conditions of war.

The second problem lies in the qualification as 'combatant' entitling the state to detain and the individual to POW status. Geneva Convention III sets out who belongs to the category of combatants. It includes regular soldiers,[154] civilian personnel associated with the military,[155] inhabitants defending themselves unorganised,[156] and members of other irregular forces, provided they fulfil the conditions of being under a chain of command, showing a distinctive sign, carrying arms openly and adhering to

[147] De Preux (1960) 546.
[148] McDonald and Sullivan (2003) 314-15.
[149] McDonald and Sullivan (2003) 313.
[150] Mariner 'Indefinite detention on Guantanamo' (2002a) *Find Law's Writ*, 28 May 2002.
[151] Just as crime can never be eradicated. Cf Mariner (2002a).
[152] McDonald and Sullivan (2003) 312-13. Cf Roberts (2004) 743.
[153] Cf McDonald and Sullivan (2003) 314 and Franck (2004) 687.
[154] Art 4 A(1) and (3).
[155] Art 4 A(4) and (5).
[156] Art 4 A(6).

the *ius in bello*.[157] Terrorist suspects captured during an armed conflict would probably fit best in the last category.[158]

In present-day conflicts, distinctions between combatants and non-combatants are increasingly blurred, so it often becomes difficult to determine the status of captured persons. If any doubts as to such status arise, the determination shall be made by a competent tribunal.[159] Like in international human rights standards, such a tribunal needs to be independent, impartial and competent to make a binding decision in each individual case.[160] This is due to the grave consequences such a decision may have as well as to international judicial minimum standards generally accepted.[161]

Persons not qualifying for combatant and POW status, automatically have the status of a civilian.[162] Geneva Convention IV, however, does not protect all civilians equally, but distinguishes according to the nationality of persons. The definition of protected persons excludes the detaining state's own nationals, as well as nationals of neutral or co-belligerent states as long as normal diplomatic protection is available to them.[163]

---

[157] Art 4 A(2).
[158] Cf Aldrich 'The Taliban, Al Qaeda and the determination of illegal combatants' (2002) 96 *American J of International L* 894-96 and Neier 'The military tribunals on trial' (2003) 50 *New York Review of Books*, no 17, 17 November 2003.
[159] Geneva Convention III art 5.
[160] Cf Geneva Convention III art 84. See also UN Commission of Human Rights, Working Group on Arbitrary Detention, *Civil and political rights, including the question of torture and detention*, UN Doc E/CN.4/2003/8, 16 December 2002, para 64 and *US v Noriega*, 808 F Supp 791, 796 (SD Fla 1992). See further Vierucci 'Prisoners of war or protected persons *qua* unlawful combatants? The judicial safeguards to which Guantanamo Bay detainees are entitled' (2003) 1 *J of International Criminal Justice* 302.
[161] Vierucci (2003) 302.
[162] Uhler and Coursier (1958) 51.
[163] Geneva Convention IV art 4. Uhler and Coursier (1958) 46 divides the class of protected persons into 'enemy nationals within the national territory of the each of the Parties to the conflict' and 'the whole population of occupied territories (excluding nationals of the Occupying Power)'. The 'diplomatic protection' exception is due to the rationale, that persons who can resort to diplomatic protection do not need protection under the Convention. See Vierucci (2003) 310 and Sassòli 'The status of persons held in Guantanamo under international humanitarian law' (2004) 2 *J of International Criminal Justice* 103-104.

The nationality exception was, however, interpreted progressively in light of the change of nature of contemporary conflicts in the *Tadić* case.[164] The Court emphasized factual allegiance to one of the parties to the conflict rather than formal bonds of nationality. In the case of the 'war on terrorism', allegiance to the *jihad,* for example, may substitute mere formal nationality, thus, expanding the eligible group of protected persons.[165]

Protected persons may only be deprived of their liberty in two exceptional cases.[166] Firstly, they may be detained for the purpose of ordinary criminal prosecution and punishment under domestic law.[167] Secondly, they may be detained for imperative security reasons.[168]

Resort to the latter measure, however, is limited. Substantively, detention for security reasons must be an exceptional measure of absolute necessity, although in practice states enjoy a considerable measure of discretion in assessing exceptional circumstances and military necessity.[169] Detention orders must further be made on an individual, rather than a general or group basis.[170] Procedural requirements encompass a prompt right of appeal and the right of biannual periodical review thereafter.[171] Although review can be carried out by administrative boards, these boards must again be independent, impartial and competent.[172] Furthermore, such detention of civilians is subject to detailed rules regulating their treatment.[173]

---

[164] *Prosecutor v Tadić* (IT-94-1-A) Appeals chamber, Judgment of 15 July 1999 para 166.
[165] Vierucci (2003) 310 citing further support for this interpretation, for example the US Army Field Manual.
[166] Geneva Convention IV art 79.
[167] Geneva Convention IV art 64. See also Sassòli (2004) 104.
[168] Geneva Convention IV arts 42 and 78.
[169] Geneva Convention IV arts 42 and 78. See also Uhler and Coursier (1958) 257-58 and 367.
[170] Uhler and Coursier (1958) 367.
[171] Geneva Convention IV arts 43 and 78.
[172] Geneva Convention IV arts 43 and 78. See also Uhler and Coursier (1958) 260 and Sassòli (2004) 104.
[173] Geneva Convcention IV arts 79-135. See also Sassòli (2004) 104.

Civilians exempted from the protected person status[174] are mainly subject to the law of the detaining state, since the general protection clauses of Part II of Geneva Convention IV make no mention of rights relating to the detention.[175] What offers protection with regard to the deprivation of liberty, however, is common art 3, which features in all four Geneva Conventions. This provision introduces a minimum standard applicable to all non-combatants in any armed conflict.[176]

Art 3(1)(d) prohibits the passing of sentences without proper trial, that satisfies judicial guarantees recognized as indispensable by civilized peoples.[177] As these minimum guarantees are derived from both human rights and humanitarian law, they include the prohibition of arbitrary detention, the right to be informed of the grounds for detention as well as the right to challenge detention before a judge within reasonable time.[178] Hence, conventional international humanitarian law envisages minimum standards similar to international human rights law regarding the detention of non-combatants.

---

[174] Nationals of the respective state or nationals of allied or neutral states with the possibility of diplomatic protection.

[175] Arts 13-26 provide for restrictions in the conduct of war, protecting especially children, women, the aged and wounded and sick persons. Part II features practical measures intended to diminish destruction, rather than safeguards against arbitrary action. See Uhler and Coursier (1958) 118. Cf also Vierucci (2003) 298.

[176] Geneva Conventions I-IV art 3 targets non-international armed conflicts, but it is generally accepted that it applies to international armed conflicts as well: 'Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick.' See *Nicaragua Case (Nicaragua v US)* (1986) ICJ Rep 114. See also Vierucci (2003) 310-11.

[177] As well as carrying out executions without proper trial. Cf also Uhler and Coursier (1958) 39.

[178] Vierucci (2003) 311 and Meron *Human rights and humanitarian norms as customary law* (1989) 96. See also Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, signed 8 June 1977, entered into force 7 December 1979, art 75(3) which provides that '[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist'.

2.4.2. International customary humanitarian law

Common art 3 is also recognized as part of international customary law,[179] as well as the fundamental guarantees laid down in art 75 of Protocol I to the Geneva Conventions.[180] Art 75 provides that anyone held by a party to an armed conflict must be afforded judicial safeguards and basic due process rights, regardless of nationality or status.[181]

Apart from these minimum standards, international customary law also grants more favourable protection to protected persons. While acknowledging the right to detain POWs as long as hostilities continue, international customary law prohibits arbitrary detention of any kind.[182] Accordingly, detention is only legal when its purpose satisfies valid needs.[183] Furthermore, procedural requirements must be adhered to in order to prevent arbitrary detention. These safeguards include the obligation to inform the detainee of the reasons for detention and the detainee's right to challenge detention before an independent judicial authority.[184]

Furthermore, international customary law also pursues the goal of mitigating effects of warfare and, hence, obliges states not to hold anyone for a longer time than absolutely necessary.[185] This applies to POWs, who must be repatriated without delay after the cessation of active hostilities, as well as to civilians, who must be released as soon as the grounds for their detention cease to exist.[186]

---

[179] *Nicaragua Case (Nicaragua v US)* (1986) ICJ Rep 114. See also Meron (1989) 28 and 34-35.
[180] Matheson 'The United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 *American University J of International L & Policy* 427 and Taft 'The law of armed conflict after 9/11: some salient features' (2003) 28 *Yale J of International L* 322. See also Meron (1989) 65 and Vierucci (2003) 311-12.
[181] Protocol I Additional to the Geneva Conventions art 75(3), (4) and (6). See also Vierucci (2003) 312.
[182] ICRC *Customary international humanitarian law* (2005) 344-45.
[183] ICRC (2005) 345.
[184] ICRC (2005) 349-52.
[185] ICRC (2005) 451-56.
[186] ICRC (2005) 451.

2.5. The prohibition of detention without trial

In order to fulfil their function of providing security and order, states depend on the power to deprive persons of their individual liberty. This power, however, is likely to be abused or employed incorrectly, not least when it is used to counter highly emotionalised threats like terrorism.[187] Moreover, deprivation of liberty burdens affected individuals with grave consequences, which bear the potential of destroying lives and, in the worst cases, even causing death.

Responding to these flaws, the exercise of state power has been subjected to restrictions for centuries.[188] The restrictions are nowadays codified in the international law of human rights, complemented by humanitarian law in times of armed conflict. International human rights and international humanitarian law of conventional as well as customary nature establish one rule of general validity: the prohibition of arbitrary detention under all circumstances.[189]

Several conditions need to be satisfied to render detention non-arbitrary and legal under international law. Firstly, detention must be justified on objective grounds in each individual case. In human rights law, such grounds must be stated in a prior legal basis and, in addition, comply with standards of basic justice, that is they must be reasonable, appropriate and proportional. Humanitarian law authorizes the detention of combatants by reason of their status as POWs as well as detention of civilians for imperative security reasons of absolute necessity.

---

[187] This even more so in the case of so-called catastrophic terrorism involving mass casualties and destruction. See for an account of such an emotionalised approach Wedgwood 'Countering catastrophic terrorism: an American view' in Bianchi *Enforcing international law against terrorism* (2004) 117. Cf also Taft (2003) 319.

[188] Beginning with the Magna Charta of 1215.

[189] Cf Meron (1989) 96 and Vierucci (2003) 311. It is assumed that the deprivation of liberty following conviction for an offence according to criminal procedure is not arbitrary, given that fair trial standards have been met. Hence, it is the above prescribed practice of administrative detention which is viewed her, rather than regular imprisonment of criminals.

Secondly, detainees must be told why they have been arrested and detained. This information must be given quickly.[190] Moreover, such information is necessary before the detainee can challenge the deprivation of liberty.

This leads to the third requirement, which demands that the administrative decision to detain must be reviewed by a neutral third authority, at least at the request of the detainee. However shaped, such authority must be independent, impartial and competent and rely on a fair procedure. Hence, review is usually best conducted by the judiciary. In the case of POWs, judicial review is not necessary, unless doubts as to their status arise. In such cases, their status shall be determined by a neutral, independent and competent tribunal.[191]

Additionally, the prohibition of arbitrary detention also involves a temporal element. The basic principle is: 'the longer the detention, the higher the probability of arbitrariness.' Although a specific time limit can not be found in human rights law and jurisprudence, the permissible period of administrative detention without trial must be measured in hours or days rather than weeks, following which judicial review must commence.[192] Indefinite detention without judicial review is prohibited.

Hence, there are no legal black holes in international law, into which individuals could fall. This even more so, as human rights law applies at any time, even in times of war.[193] Human rights and humanitarian law norms do not contradict, but reinforce one another.[194]

---

[190] POWs, however, need not be informed as they are usually aware of the fact that they may be interned when captured.
[191] See ch 2.4.1. above.
[192] Human Rights Committee, General Comment No 8 para 2. See also *Brogan v UK* (1989) 11 EHRR 117, [119] *Aksoy v Turkey* (1997) 23 EHRR 556, *Castillo Petruzzi et al case*, judgment of 30 May 1999 [1999] IACHR 6 para 111, *County of Riverside v McLaughlin*, 111 S Ct 1661, 1670-71 (1991) and *Marab v IDF Commander in the West Bank*, HC 3239/02, 57(2) PD 349 para 26. See further ICRC (2005) 350.
[193] *Legality of the threat or use of nuclear weapons (United Nations)* Advisory Opinion (1996) ICJ Rep 226, 240. Cf ICRC (2005) 299.
[194] Cf Human Rights Committee, General Comment No 29 para 16. See also ICRC (2005) 301-302 and Wilde 'Legal "black hole"? Extraterritorial state action and international treaty law on civil and political rights' (2005) 26 *Michigan J of International L* 787.

Although states may derogate from certain obligations under human rights treaties, derogation is limited by strict conditions of necessity, efficiency and time limitation. Moreover, minimum procedural guarantees are themselves non-derogable as they are necessary to safeguard other non-derogable rights. Accordingly, while the right to liberty may in principle be derogated from, derogation may not include the right to judicial review in such cases.[195]

3. Detention without trial as an antiterrorism measure: case studies

Now that the norms restricting detention without trial have been established, the focus shifts to the actual practice of states responding to the terrorist attacks of 9/11. In countering terrorism, states frequently chose to abrogate existing norms of international law. The case studies include the United States of America and the United Kingdom, the two main proponents of the current 'war on terrorism', as well as Israel, which faces a similar threat. Finally, a brief survey of other states' approaches pointing into a similar direction, complements the case studies.

The case studies pay attention to actual detention practices and legislation allowing for administrative detention. Since the practices contradict existing rules of international law, justifications to circumvent these rules are considered in a second step. Thirdly, the judiciary's view will be taken into account. Taken together, these components provide evidence for state practice and *opinio iuris* necessary for the final analysis in the subsequent chapter.

3.1. USA

Inevitably, the first case study focuses on the state directly affected by 9/11. The USA reacted to the attacks, *inter alia*, with the infringement of civil liberties, among them the right to personal liberty.[196] Interestingly, the use of administrative detention

[195] But cf Neuman (2004) 1026-28.
[196] The other major infringement of rights is caused by enhanced surveillace powers. See for an account of antiterrorism measures Schulhofer *The enemy within: intelligence gathering, law enforcement, and*

as a means to combat terrorism was hardly considered in the USA pre-9/11.[197] The terrorist strikes transformed this lack of interest towards administrative detention into an attitude of fervent support. Legislative action resulted mainly in the adoption of the USA PATRIOT Act,[198] while executive action culminated in the detention of 'unlawful combatants' at Guantanamo Bay. The latter action is reviewed first, as it contradicts international law norms most blatantly.

3.1.1. Executive action: 'enemy combatants' and mass detentions

Without a doubt, the detention practice at Guantanamo Bay, Cuba, is the most infamous example of detention without trial in the contemporary counterterrorism efforts. Guantanamo Bay is a naval base on Cuban territory occupied by the USA on the basis of a lease treaty with Cuba from 1903.[199] The USA exercises complete jurisdiction and control over the base, while Cuba retains ultimate sovereignty.[200]

In the course of the military operations to unseat the Taliban government in Afghanistan, the USA started transferring captured persons, which it suspected to be terrorists, to Guantanamo Bay in January 2002.[201] The detainees were then declared to be 'unlawful combatants', a term unknown by international law.[202] As such the USA denied them POW protection under Geneva Convention III.[203] Nor did the USA apply Geneva Convention IV or international human rights law, but stripped the detainees of

---

civil liberties in the wake of September 11 (2002) and Chang *Silencing political dissent: how post-September 11 anti terrorism measures threaten our civil liberties* (2002).

[197] As Gross (2001) 787 observes shortly before the terrorist attacks in New York and the Washington.

[198] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub L 107-56, 115 Stat 272 (2001).

[199] Agreement between the United States and Cuba for the lease of lands for coaling and naval stations, 23 February 1903.

[200] Agreement between the United States and Cuba for the lease of lands for coaling and naval stations, 23 February 1903 art III.

[201] Borelli 'The treatment of terrorist suspects captured abroad: human rights and humanitarian law' in Bianchi *Enforcing international law against terrorism* (2004) 39 and Vierucci (2003) 285.

[202] Sassòli (2004) 100-101. The terms 'unlawful combatants' and 'enemy combatants' are used interchangeably.

[203] US Department of Defense 'News Briefing, Secretary Rumsfeld and Gen Myers' 11 January 2002, available at http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html (accessed 30 January 2006). See also *Rasul v Bush*, Brief for the respondents (2004) WL 425739 (US) 6-7.

most of their fundamental rights, particularly the right to personal liberty and its surrounding safeguards.[204]

The US government asserted that detainees had no access to domestic courts in order to challenge their detention.[205] Instead they could be detained indefinitely at the President's sole discretion.[206] Although the detainees' status as combatants and POWs is doubtful, no judicial hearings were held to determine this status as demanded by international humanitarian law.

Hence, the detainees, around 550 in number,[207] found themselves in a legal limbo where they could not legally defend themselves against mistakes and abuse. Although the US government has asserted that the detainees were the 'hardest of the hard-core'[208] and the 'worst of a very bad lot',[209] the practice is nevertheless highly arbitrary and *Kafkaesque*. The problem is not that a terrorist is locked up, but how the judgment whether a person is deemed a terrorist or not, is made. This judgment is rendered upon executive opinion, rather than an objective finding of the judiciary after hearing each individual case properly.

This problem also existed with regard to two American citizens, *Padilla* and *Hamdi*, who were both classified as 'enemy combatants' and held in indefinite administrative detention in naval brigs on American soil.[210] While none of them was

---

[204] Ross 'Jurisdictional aspects of international human rights and humanitarian law in the war on terror' in Coomans and Kamminga *Extraterritorial application of human rights treaties* (2004) 17 and Martinez (2005) 6. The US Department of State's legal advisor William H Taft, IV has in the meantime acknowledged that 'unlawful combatants' fall under Geneva Convention IV. See Taft (2003) 321. However, the government has not yet acted in accordance with its legal advisor's opinion and is still reluctant to grant proper judicial review. See Sassòli (2004) 104.

[205] *Rasul v Bush*, Brief for the respondents (2004) WL 425739 (US) 14-16.

[206] *Rasul v Bush*, Brief for the respondents (2004) WL 425739 (US) 16-17. See also Martinez (2005) 6.

[207] The Joint Task Force, Guantanamo Bay, Cuba (JTF-GTMO) Information from Guantanamo detainees, as of 4 March 2005, available at http://www.defenselink.mil/news/Mar2005/d20050304info.pdf (accessed 30 January 2006).

[208] As Secretary of Defense Rumsfeld called them. Cited in Thomas (2003)1215.

[209] According to Vice President Cheney. New York Times, 28 January 2002, A6 cited in Walker (2005) 51. President Bush announced that the detainees were all 'killers'. See Dworkin 'The threat to patriotism' (2002) 49 *New York Review of Books* no 3, 28 February 2002.

[210] Jose Padilla was arrested on 8 May 2002 at the Chicago airport and held initially on a material witness warrant. On 9 June 2002 he was designated as 'enemy combatant' by a Presidential directive

charged with a criminal offence, let alone put to trial before a judge for three, respectively four years, Hamdi was released and deported in October 2004 following an agreement with the government.[211] Padilla was detained in military custody until recently. He was indicted in September 2005 and ordered to be transferred to civilian custody.[212]

The administration derived the legal basis for detentions of 'enemy combatants' from the President's inherent wartime powers as Commander-in-Chief.[213] Furthermore, the executive justified far-reaching Presidential detention powers with the Congressional authorization to use necessary force in order to prevent future terrorist attacks.[214] Using this authorisation, the President issued an executive order authorizing the detention of non-citizens at his behest, leaving subsequent trial before military commissions only optional.[215]

The US government's policy consisted (and still does) of unilaterally declaring persons to belong to a category which does not exist in international law and putting them into a grey area where neither humanitarian law, nor criminal law – reflecting

---

and incarcerated in a Navy brig in South Carolina, where he is since held without trial. It is alleged that he planned to explode a 'dirty bomb', ie a conventional bomb loaded with radioactive material. The directive is available at http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf (accessed 31 January 2006).Yaser Esam Hamdi was captured in Afghanistan and brought to Guantanamo Bay in January 2002. When his American citizenship was discovered in April 2002, he was transferred to the same Navy brig in South Carolina subsequently. See for both cases Weisselberg 'The detention and treatment of aliens three years after September 11: a new new world?' (2005) 38 *University of California Davis LR* 838-39.

[211] In which he renounced US citizenship and agreed not to sue the US government over his detention. See Agreement, *Hamdi v Rumsfeld* (ED Va 17 September 2004) (No 2:02CV439). See also Moeckli 'The US Supreme Court's "enemy combatant" decisions: a "major victory for the rule of law"?' (2005) 10 *J of Conflict & Security L* 93.

[212] See ch 3.1.4. below.

[213] See for example the Presidential directive to detain Padilla (fn 210 above) and *Rasul v Bush*, Brief for the respondents (2004) WL 425739 (US) 16-17. See also Weisselberg (2005) 839.

[214] Authorization for Use of Military Force, Joint resolution to authorize the use of United States armed forces against those responsible for the recent attacks launched against the United States, 18 September 2001, Pub L No 107-40, 115 Stat 224 (2001).

[215] Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, 66 Fed Reg 57833, 57834 (2001) ss 2 and 3.

human rights law – applied.[216] Consequently, minimum standards of international law were not adhered to.[217]

The approach is in breach of the prohibition of arbitrary detention, since detention without trial for a period of more than 4 years, accompanied by the prospect of indefinite detention, is far too extensive. Arbitrariness is further enhanced by the fact that allegations, the decision on deprivation of liberty and its execution all lie in the hand of one single authority. This also contravenes the international minimum standard providing for the right to independent judicial review.

In the domestic sphere, the administration resorted to immigration law to detain non-citizen suspects. Shortly after 9/11 the Immigration and Naturalization Service (INS) enacted interim rule 2171-01, which authorizes detention without trial for an indeterminate period of time 'in the event of an emergency or other extraordinary circumstance'.[218] Based on interim rule 2171-01, the INS detained around 1200 non-citizens, often on more than dubious grounds.[219] They were then held, some for several months, until proven innocent, hence, turning the presumption of innocence on its head.[220]

While the approach to detain non-citizens for violations of visa regulations was legal in principle, the practice in these cases was overly harsh.[221] The lack of

---

[216] Cf Bhoumik 'Democratic responses to terrorism: a comparative study of the United States, Israel, and India' (2005) 33 *Denver J of International L & Policy* 320.
[217] Steyn 'Guantanamo Bay: the legal blackhole' (2004) 53 *International & Comparative LQ* 12.
[218] INS Interim rule No 2171-01, 66 Fed Reg 48334-01, 48335 (2001).
[219] Detentions resulted from anonymous or neighbour's allegations, traffic checks or while a person was lingering near sensitive infrastructure. An Egyptian man was arrested, when he asked a policeman to show him the way to the next INS office so he could extend his visa. See Human Rights Watch (2002b) 14-15. See also US Department of Justice, Office of the Inspector General (2003) 16-17.
[220] Ross (2004) 23. Cf also US Department of Justice, Office of the Inspector General (2003) 69-71.
[221] US Department of Justice, Office of the Inspector General (2003) 72-73. See also Schulhofer (2002) 12 and Hoffman (2004) 946-47. Minor violations leading to detention included working on a tourist visa and failure to complete the prescribed number of courses for student visas. See Amnesty International *United States of America: Amnesty International's concerns regarding post September 11 detentions in the USA*, AMR 51/044/2002 (2002) 11 and . Cf also Weisselberg (2005) 825-30

proportionality, together with the random and discriminative character of detentions[222] violated minimum standards of international human rights law, which also apply to immigration procedures.[223] This was accompanied by a pattern of mistreatment and abuse of these detainees, underscoring the significance of the minimum standards for the well being of persons deprived of their liberty.[224]

3.1.2. Legislative action: the PATRIOT Act

The legislative branch reacted to the terrorist attacks by adopting the comprehensive PATRIOT Act. Actually, the bill was proposed by the executive and rushed through congress in short time, due to high pressure from the executive.[225] Apparently, hardly any of the representatives had read the bill before it was adopted.[226]

With regard to detention without trial, the PATRIOT Act contains one provision of concern, which authorizes the Attorney General to detain non-citizens of whom he has 'reasonable grounds to believe' that they are engaged in terrorist activity or endanger national security in another way.[227] Terrorist activity is defined very broadly and includes *inter alia* membership in a terrorist organisation, whether officially designated or not, and soliciting funds, membership or other material support to such an organisation, even if such organisation pursues legitimate political goals.[228] Terrorist activity is further expanded to encompass any crime involving a 'firearm, or other weapon or dangerous device (other than for mere personal monetary gain)'.[229]

---

[222] Obviously, only muslim or Arabic looking men were targeted of which only a handful were charged subsequently for minor crimes like fraud, but not a single one related terrorism, let alone in connection with 9/11. See Amnesty International (2002) 8 and US Department of Justice, Office of the Inspector General (2003) 30-31

[223] Cf Ross (2004) 23.

[224] US Department of Justice, Office of the Inspector General (2003) 142-48 and Ross (2004) 23.

[225] Cole and Dempsey *Terrorism and the constitution: sacrificing civil liberties in the name of national security* (2002) 151.

[226] Cole and Dempsey (2002) 151.

[227] Pub L 107-56, 115 Stat 272, 351 (2001) s 412(a) .

[228] Pub L 107-56, 115 Stat 272, 347 (2001) s 411(a)(1)(F). See also Chang (2002) 62-3.

[229] Pub L 107-56, 115 Stat 272, 346 (2001) s 411(a)(1)(E). According to Chang (2002) 62 this definition stretches the term 'terrorism' beyond recognition, as a bar brawl involving a knife or broken beer bottle as well as a crime of passion would fall under this definition.

Upon the Attorney General's unreviewed certification, a non-citizen may at first be detained for seven days without being charged.[230] If, following this period, the Attorney General charges the person with any offence under criminal or immigration law, even if unrelated to terrorism, he may continue detention indefinitely.[231] The only requirement is a biannual review of the detention by the Attorney General himself.[232]

While the detainee does not have to be informed of the evidence leading to certification and detention, the PATRIOT Act provides for the possibility of challenge in *habeas corpus* proceedings in a federal district court.[233] In normative perspective, this is in compliance with international minimum standards of human rights law. In practice, however, the costs of filing *habeas corpus* and litigating before such a court are likely to hamper recourse to such judicial review considerably.[234]

The PATRIOT Act's detention powers under s 412(a) have not been invoked so far.[235] This was due to the availability of other administrative procedures to detain non-citizens, namely under interim rule 2171-01, which were less unwieldy.[236] Hence, non-usage of the provision was not due to human rights concerns, but rather to circumvent the legislation's obstacles.[237]

---

[230] Pub L 107-56, 115 Stat 272, 351 (2001) s 412(a).
[231] Either until deportation of the person or the Attorney General's decision of ending certification as terrorist or threat to national security respectively. See Pub L 107-56, 115 Stat 272, 351 (2001) s 412(a). See also Chang (2002) 64.
[232] Pub L 107-56, 115 Stat 272, 351 (2001) s 412(a).
[233] Pub L 107-56, 115 Stat 272, 351-52 (2001). See also Chang (2002) 65.
[234] Given that non-citizens are likely to be in difficult financial situation. Costs include, for example, hiring a lawyer or travel costs. Furthermore, appeal is only possible before the US Court of Appeals in Washington, DC. See Pub L 107-56, 115 Stat 272, 351-52 (2001) s 412(a). See also Chang (2002) 65-66.
[235] Report of the Committee on the Judiciary, H Rept 109-174, part 1 to accompany HR 3199, USA PATRIOT and Terrorism Prevention Act of 2005, 18 July 2005 (2005) 464. The report relies on the administration's verbal assurance that s 412(a) has not been employed so far and raises criticism as to the government's failure to provide 6 out of 7 envisaged reports on the matter.
[236] As they neither provide for *habeas corpus* review, nor for a duty to report invocation to Congress. See H Rept 109-174 (2005) 464 and Weisselberg (2005) 831.
[237] See H Rept 109-174 (2005) 464-65 and Weisselberg (2005) 831.

3.1.3. Justification: exceptional state of war, changed circumstances, necessity

The US administration's norms and practice regarding detention of terrorist suspects contravene minimum standards required by international law. Usually, there are three ways states react when they contravene rules of international law: denial of the action, denial of the rule's existence or validity, or justification of the action on other grounds. The US government made no efforts to hide its action, but resorted to the last of the three options. This openness supports the contention that the US government felt that it was legally entitled to act in the way it did. Hence, the justifications stated by the executive may be viewed as expressions of *opinio iuris*.

According to the US administration's fundamental claim, the country is at war with global terrorism, in particular with the network of Al Qaeda.[238] It has often been suggested that the struggle against terrorism is of fundamental importance for the survival of the nation.[239] While the state of such a war constitutes exceptional circumstances, an end of these circumstances cannot be predicted in the nearer future, which has also been acknowledged by the administration itself.[240] Nevertheless, this exceptional situation warrants exceptional measures.

The 'exceptional circumstances' approach resembles the logic of derogation provisions in international human rights treaties,[241] under which states are not compelled to uphold all the rights when this would cause their demise or at least substantial devastation.[242] The survival of the state is valued above the protection of human rights.[243] Indeed, the USA officially proclaimed a state of emergency in the aftermath of 9/11, accompanied by said congressional authorisation of the President to

---

[238] See for example *Rasul v Bush*, Brief for the respondents (2004) WL 425739 (US) 1. See also Shelton 'The legal status of the detainees at Guantanamo Bay: innovative elements in the decision of the Inter-American Commission on Human Rights of 12 March 2002' (2002) 23 *Human Rights LJ* 14 and Moeckli (2005) 87-88

[239] Franck (2004) 687.

[240] See for example *Hamdi v Rumsfeld*, 124 S Ct 2633, 2641 (2004). See also President of the United States of America 'The National Security Strategy of the United States Of America, September2002' (2003) 24 *Human Rights LJ* 135.

[241] ICCPR art 4, EuCHR art 15 and AmCHR art 27.

[242] See ch 2.3.

[243] '[T]reaties could never diminish the illimitable constitutional powers of the supreme commander in a life-or-death struggle.' See Franck (2004) 687.

use military force.[244] The USA did not, however, avail itself of the right of derogation under art 4 of the ICCPR as no notification or other declaration to this end was made.

The US government claimed that global terrorism has changed circumstances dramatically.[245] The diffuse threat, the dissolution of the geographical attachment of the conflict, and potentially massive damage caused with little effort supposedly created a completely new situation, which existing rules may not match anymore.[246] Instead, the executive claimed extraordinary powers to respond to the new threat.

The specific measures were justified on grounds of necessity. In our case, detention without trial was deemed a necessary tool to avert the grave threat of terrorism to the overarching goal of national security.[247] The administration's interpretation of the abstract concept of national security emphasizes territorial security, rather than safety of the individual.[248] Accordingly, the latter was subordinated to the former, especially in the case of terrorist suspects who are denied basic rights to protect themselves against state action.

3.1.4. The judiciary: the Supreme Court's view

While the executive views itself legally entitled to detain terrorist suspects under domestic as well as international law, it is not the only branch of state which may express *opinio iuris*. Regarding the infringement of fundamental rights, it is also important to look at the opinion of the judiciary, since this branch is mainly concerned with the statement of what the law is. The practice of detention without trial was the

---

[244] Office of the Press Secretary, Declaration of National Emergency by Reason of Certain Terrorist Attacks, by the President of the United States of America, 14 September 2001. See also Pub L No 107-40, 115 Stat 224 (2001).
[245] President of the United States of America (2003) 137.
[246] Franck (2004) 688.
[247] See the highly suggestive name of the PATRIOT Act: Uniting and Strengthening America by *Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* Act of 2001, Pub L 107-56, 115 Stat 272 (2001) (emphasis added). See also Strossen 'Conservatives and Liberals unite to conserve liberty and security' in Goldberg, Goldberg and Greenwald *It's a free country: personal freedom in America after September 11* (2002) 61 and McDonald and Sullivan (2003) 312.
[248] The President of the United States of America (2003) 138. Cf Gearty 'Terrorism and human rights' (2005b) 10 *European Human Rights LR* 4.

subject of several cases which ultimately reached the Supreme Court.[249] A consistent conclusion was, however, neither provided by the lower courts, nor by the highest court.

Lower courts oscillated between deference to and repudiation of the executive's claims.[250] Moreover, the Supreme Court took no opportunity to announce its general view on the detention practices and avoided commenting on applicable international law.[251] This is even more surprising as the applicants' argumentations, accompanied by numerous *amicus curiae* briefs, were packed with references to international human rights and humanitarian law.[252]

In *Rasul*,[253] the Supreme Court had to decide on the question whether 'enemy combatants' could challenge the legality of their detention at Guantanamo Bay in US courts. The petitioners claimed that they never participated in hostilities against the USA or engaged in terrorist acts and therefore were no 'enemy combatants'.[254] The challenge of legality was directed towards the factual basis of detention.

The district court and the court of appeals had dismissed the suits due to lack of jurisdiction.[255] The detainees were captured during ongoing hostilities in Afghanistan and subsequently detained at the US naval base in Cuba.[256] Based on *Eisentraeger*,[257]

---

[249] *Rasul v Bush*, 124 S Ct 2686 (2004), *Hamdi v Rumsfeld*, 124 S Ct 2633 and *Rumsfeld v Padilla*, 124 S Ct 2711 (2004).
[250] See for example *Hamdi v Rumsfeld*, 296 F 3d 278 (4th Cir Va 2002), which was remanded to *Hamdi v Rumsfeld*, 243 F Supp 2d 527 (E D Va 2002). This judgment was reversed by *Hamdi v Rumsfeld*, 316 F 3d 450 (4th Cir Va 2003) and en banc denied in the rehearing by *Hamdi v Rumsfeld*, 337 F 3d 335 (4th Cir 2003).
[251] Moeckli (2005) 85-87.
[252] See for example *Al Odah v US*, Brief for Petitioners (2004) WL 96764 and *Rasul v Bush*, Brief Amicus Curiae of International Law Expert in Support of the Petitioners (2003) WL 22429202. See also Moeckli (2005) 86.
[253] *Rasul v Bush*, 124 S Ct 2689.
[254] *Rasul v Bush*, 124 S Ct 2691.
[255] *Rasul v Bush*, 215 F Supp 2d 55 (D DC 2002) and *Al Odah v US*, 321 F 3d 1134 (CA DC 2003). See also Otty and Olbourne 'The US Supreme Court and the "war on terror": *Rasul* and *Hamdi*' (2004) 9 *European Human Rights LR* 559.
[256] Over which Cuba has ultimate sovereignty and the USA exercises complete jurisdiction and control. See ch 3.1.1 above. See also *Rasul v Bush*, 124 S Ct 2687.
[257] In this case 21 German nationals captured ate the end of World War II in China were tried for espionage by a US military commission in China and detained at Landsberg prison, Germany. The

the lower courts approved the government's claim that aliens captured and held outside US sovereign territory had no recourse to *habeas corpus* review by US courts.[258]

The Supreme Court reversed the dismissal and remanded the cases.[259] Justice Stevens who delivered the majority opinion reasoned that in contrast to *Eisentraeger* the detainees were not charged with an offence at all, let alone tried and convicted.[260] Furthermore, US courts had jurisdiction over Guantanamo Bay detainees, because the USA exercised territorial jurisdiction over the leased area.[261] Additionally, Justice Stevens found that under the federal habeas corpus statute[262] the detainee's presence within a court's territorial jurisdiction was no 'invariable prerequisite'.[263] Instead the presence of the custodian was found to be sufficient, because the writ of *habeas corpus* is directed against the person holding the detainee.[264] Finally, the historical reach of the writ of *habeas corpus* in common law extended not only to the sovereign territory of the realm, but also to all other dominions under the sovereign's control.[265]

Accordingly, the detainees were entitled to challenge their designation as such in court.[266] Although the Supreme Court did not rule on the merits,[267] *Rasul* supported the prohibition of detention without trial in international law, finding that

> '[e]xecutive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to

---

Supreme Court held that US courts had no basis to extend their jurisdiction for a writ of *habeas corpus*, because 'these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.' *Johnson v Eisentrager,* 70 S Ct 936, 943 (1950).

[258] *Rasul v Bush*, 215 F Supp 2d 65 and *Al Odah v US*, 321 F 3d 1145.

[259] *Rasul v Bush*, 124 S Ct 2686.

[260] *Rasul v Bush*, 124 S Ct 2693.

[261] *Rasul v Bush*, 124 S Ct 2696. See also Otty and Olbourne (2004) 559.

[262] 28 USC para 2241(a).

[263] *Rasul v Bush*, 124 S Ct 2695. See also *Braden v 30th Judicial Circuit Court of Kentucky*, 93 S Ct 1123, 1129 (1973).

[264] *Rasul v Bush*, 124 S Ct 2695 and *Braden v 30th Judicial Circuit Court of Kentucky*, 93 S Ct 1129. See also Otty and Olbourne (2004)

[265] *Rasul v Bush*, 124 S Ct 2696-97.

[266] *Rasul v Bush*, 124 S Ct 2698. See also Moeckli (2005) 92.

[267] *Rasul v Bush*, 124 S Ct 2699.

> counsel and without being charged with any wrongdoing--unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."'[268]

Justice Scalia, however, sided with the government. He condemned the majority decision as 'judicial adventurism of the worst sort' that was 'in frustration of our military commanders' reliance upon clearly stated prior law'.[269]

In *Hamdi* the Supreme Court had to rule on the legality of the government's classification and detention of a US citizen as 'enemy combatant'.[270] Furthermore, the court had to address the constitutionally owed process to challenge such classification.[271]

A majority of five justices upheld in principle the government's claim to classify US citizens as 'enemy combatants' and detain them without charges or trial.[272] The practice was found to be legal, because it was included in the war time powers granted by the congressional authorization to use military force against those responsible for 9/11.[273] The Supreme Court confirmed the administration's creation of the special category of 'enemy combatants', which is unknown to international law.[274]

Nevertheless, the Supreme Court rejected the government's notion of largely unreviewable powers to detain 'enemy combatants' without trial.[275] The government conceded that *Hamdi as* US citizen was entitled to *habeas corpus* review, because the

---

[268] *Rasul v Bush*, 124 S Ct 2698 n 15. See also Weisselberg (2005) 855.
[269] *Rasul v Bush*, 124 S Ct 2711, dissenting opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas.
[270] *Hamdi v Rumsfeld*, 124 S Ct 2635.
[271] *Hamdi v Rumsfeld*, 124 S Ct 2635.
[272] *Hamdi v Rumsfeld*, 124 S Ct 2639-40 and 2680.
[273] Pub L No 107-40, 115 Stat 224 (2001). See for the decision *Hamdi v Rumsfeld*, 124 S Ct 2640. See also Perkins '*Habeas corpus* in the war against terrorism: *Hamdi v. Rumsfeld* and citizen enemy combatants' (2004-2005)19 *Brigham Young University J of Public L* 447.
[274] *Hamdi v Rumsfeld*, 124 S Ct 2639-40. See also Moeckli (2005) 99.
[275] The plurality opinion with regard to the process owed was delivered by Justice O'Connor, followed by Chief Justice Rehnquist, and Justices Kennedy and Breyer. Justices Souter and Ginsburg concurred in this regard to secure minimum standards of process for *Hamdi*, but dissented in the first opinion that the President was authorized to detain *Hamdi*. See *Hamdi v Rumsfeld*, 124 S Ct 2644, 2650 and 2660. See also Perkins (2004-2005) 445-448.

writ of *habeas corpus* had not been suspended.[276] However, the government argued that due to appropriate judicial deference to the executive's discretion in national security and military affairs judicial review would be satisfied by a 'some evidence' standard.[277] According to this standard a court could only determine whether there was any evidence in support of the classification at all, but not assess the factual basis of such evidence.[278] The only evidence presented and found to be sufficient by the government consisted of the Mobbs declaration, which was based on hearsay that could not be verified.[279]

The Supreme Court stroke a balance between the government's claim to a low burden of proof and vast judicial deference and the individual's right to due process under ordinary criminal law, as ordered by the District Court in the first instance.[280] Justice O'Connor rejected the government's assertion, because the risk of erroneous deprivation of liberty under such broad detention powers was too high.[281] The value of national security did not trump the value of the fundamental liberties at stake, especially in times of crisis.[282]

Justice O'Connor, however, acknowledged the extraordinary circumstances of the 'war on terrorism' and also rejected the notion of full due process rights.[283] Instead she ruled that *Hamdi* must receive notice of the factual basis of his classification as 'enemy combatant' and that he must be given a meaningful opportunity to contest the factual basis before a neutral decision maker.[284] While this process could be performed by a properly constituted military tribunal, mere interrogation by the military was

---

[276] *Hamdi v Rumsfeld*, 124 S Ct 2644. See also Otty and Olbourne (2004) 563.
[277] *Hamdi v Rumsfeld*, 124 S Ct 2645. See also Perkins (2004-2005) 445.
[278] *Superintendent, Massachusetts Correctional Institution at Walpole v Hill,* 105 S Ct 2768, 2774 (1985).
[279] Mobbs was a Special Advisor to Under Secretary of Defense for Policy, who declared that *Hamdi* was an 'enemy combatant' based on the facts of his arrest which were familiar to Mobbs. See Perkins (2004-2005) 445.
[280] *Hamdi v Rumsfeld*, 124 S Ct 2646-48 and *Hamdi v Rumsfeld*, 296 F 3d 278, 281 (4th Cir 2002). See also Perkins (2004-2005) 444.
[281] *Hamdi v Rumsfeld*, 124 S Ct 2648.
[282] *Hamdi v Rumsfeld*, 124 S Ct 2648. See also Weisselberg (2005) 855.
[283] *Hamdi v Rumsfeld*, 124 S Ct 2649.
[284] *Hamdi v Rumsfeld*, 124 S Ct 2648.

excluded.[285] The plurality opinion also rejected the 'some evidence' standard, because it would render the individual's opportunity to refute classification meaningless.[286]

The Supreme Court judgment seemingly attained *Hamdi's* release. Following an agreement and the administration's change of mind that he posed no threat to national security anymore, *Hamdi* was set free and deported to Saudi Arabia.[287] The government did not give any reason for the sudden shift in its evaluation of *Hamdi's* dangerousness.[288] This silence implies that he never posed any threat.

Notwithstanding the court's rejection of the administration's claim to be free to detain without any judicial review, the actual impact of the judgments might be smaller than it seems. Neither *Rasul*, nor *Hamdi* specified the standards applicable to such judicial review proceedings.[289] Utilizing this indeterminacy, the government delegated judicial review of 'enemy combatant' detentions to Combatant Status Review Tribunals (CSRT) that were modelled on the Supreme Court decisions.[290]

These tribunals do not meet international minimum standards of independence, competency and fairness.[291] All participants come from the military, judges as well as defence counsel.[292] Furthermore, the CSRT may decide only whether the designation was wrong, but have no power to order release in such a case.[293] Detainee's rights are hampered by their possible partial exclusion from proceedings on national security grounds,[294] their limited right to call witnesses,[295] the admissibility of hearsay,[296] and

---

[285] *Hamdi v Rumsfeld*, 124 S Ct 2651.
[286] *Hamdi v Rumsfeld*, 124 S Ct 2651.
[287] Agreement, *Hamdi v Rumsfeld* (ED Va 17 September 2004) (No 2:02CV439).
[288] Moeckli (2005) 93.
[289] Moeckli (2005) 92.
[290] US Department of Defense, Order establishing Combatant Status Review Tribunals, 7 July 2004, para (e). See also US Department of Defense, Combatant Status Review Tribunals, fact sheet, 7 July 2002.
[291] Cf Moeckli (2005) 94-96.
[292] US Department of Defense, Order establishing Combatant Status Review Tribunals paras (e) and (c).
[293] US Department of Defense, Order establishing Combatant Status Review Tribunals paras (g)(12), (i) and (j).
[294] US Department of Defense, Order establishing Combatant Status Review Tribunals para g(4).
[295] US Department of Defense, Order establishing Combatant Status Review Tribunals para (g)(8).
[296] US Department of Defense, Order establishing Combatant Status Review Tribunals para (g)(9).

a rebuttable presumption in favour of the government's evidence.[297] After the CSRT finished its first round of hearings 38 detainees were released, while the rest was confirmed to be 'enemy combatants'.[298]

The CSRT are, however, not the last word. The detainees may also appeal to civil courts to challenge their detention in *habeas corpus* proceedings. Given the Supreme Court's ruling, civil courts can only review the merits of each case. This favours the government, since it will be difficult for the defence to acquire exculpatory evidence from the confusion of far away battlefields and events that happened more than three years ago.[299] Moreover, the government seems to use the CSRT outcomes as evidence in such proceedings.[300]

The case of *Padilla* concerned the most far reaching assertion of executive power: the indefinite detention without trial of a US citizen captured on American soil.[301] This power would equal the breakdown of the rule of law, since it would allow to detain any terrorist suspect, however unattached to an armed conflict or battlefield.[302] The Supreme Court, however, remanded the case on technical grounds, because the *habeas corpus* petition was filed in the wrong court.[303] The immediate custodian, that is the Commander of the Navy Brig where *Padilla* was held, was found to be the proper respondent and not the Secretary of Defense.[304] Accordingly, the petition must be filed in District Court of South Carolina, which had jurisdiction over the immediate custodian, instead of the District Court of New York.[305]

The US Court of Appeals, Fourth Circuit, ruled on the newly filed petition that the President had the power to detain US citizens indefinitely as 'enemy combatants'

---

[297] US Department of Defense, Order establishing Combatant Status Review Tribunals para (g)(12).
[298] US Department of Defense, Combatant Status Review Tribunals summary.
[299] Cf Moeckli (2005) 97.
[300] See *Al Shammeri v US*, Civil action no 02-CV-0828 (CKK) (D DC 2004) Declaration of James R Crisfield Jr. See also Moeckli (2005) 95.
[301] *Rumsfeld v Padilla*, 124 S Ct 2715. See also Moeckli (2005) 87.
[302] Cf Moeckli (2005) 87-88.
[303] *Rumsfeld v Padilla,*124 S Ct 2727.
[304] *Rumsfeld v Padilla*, 124 S Ct 2722.
[305] *Rumsfeld v Padilla*, 124 S Ct 2727.

under the congressional authorization to use force and that this power was vital to enable the President to protect the nation from terrorist attacks.[306] Hence, it reversed District court's finding that *Padilla's* detention had no basis in law.[307]

While it was expected that the case would go to the Supreme Court for appeal,[308] *Padilla* was indicted for conspiracy of murder, kidnap and maim persons in a foreign country and conspiracy to provide material support for terrorists in September 2005.[309] The charges do not, however, refer to the initial allegations that Padilla planned to explode a 'dirty bomb'. After more than four years of detention without trial *Padilla* will be given proper trial determining his guilt or innocence. In January 2006, the Supreme Court ordered on application of the Solicitor General *Padilla's* transfer from military custody to civilian custody in order to face criminal charges contained in the indictment.[310]

In summary, the judiciary's record of *opinio iuris* remains ambiguous. While it rejected the claim of unreviewable discretion to detain, the Supreme Court went along with the executive's claim that it were entitled to designate 'enemy combatants' and detain them as long as hostilities in the 'war on terror' continue, hence indefinitely.

3.2. United Kingdom

The USA's closest ally in the 'war on terrorism' also resorted to indefinite detention without trial as response to the perceived new threat, despite its poor record using this means of counter-terrorism in Northern Ireland from 1971 to 1975.[311] The UK, however, did not employ the 'enemy combatant' approach, but resorted to

---

[306] *Padilla v Hanft*, 423 F 3d 386, 397 (4th Cir 2005).
[307] *Padilla v Hanft*, 423 F 3d 397.
[308] Markon 'US can confine citizens without charges, court rules' *Washington Post* 10 September 2005 A01.
[309] *US v Hassoun, et al*, case no 04-60001-CR (SD Fl 2005).
[310] Order in pending case *Hanft v Padilla* 05A578 (Order list US 546) 4 January 2006.
[311] See Thomas (2003) 123-24. Cf also Dickson (2005) 24.

immigration law to detain terrorist suspects. In doing so, its approach resembles the provisions of the PATRIOT Act.[312]

3.2.1. The Anti-terrorism, Crime and Security Act 2001 (ATCSA)

The British legislative response to 9/11 targeted only non-citizens, since it was rooted in immigration law.[313] The detention process under the ATCSA was triggered by the Secretary of State's certification that he reasonably believes that an alien is a threat to national security or suspects that an alien is a terrorist.[314]

'Terrorism' is defined as the use or threat of serious violent action against persons or property, action that creates a serious risk to public health and safety or seriously interferes with an electronic system.[315] Additionally, the threat or use of such action must be designed to influence the government or public of any state in pursuance of a political, religious or ideological cause.[316] A person qualifies as 'terrorist' if he or she is or has been actively involved in acts of international terrorism,[317] is a member of, or supports or assists an international terrorist group.[318]

Upon certification, a non-citizen 'terrorist' could be detained without charge or trial for an indefinite period of time, if deportation was barred by legal or practical reasons.[319] Legal reasons encompassed the prospect of torture and inhuman treatment or the death penalty in the receiving state, in which case deportation would have been violating the UK's obligations under the EuCHR.[320] Practical reasons included the

---

[312] Jimeno-Bulnes 'After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples' (2004) 10 *European LJ* 243.
[313] Warbrick (2004) 1009.
[314] S 21(1).
[315] ATCSA s 21(5) refers for this definition to the Terrorism Act 2000 ss 1(1) and (2).
[316] Terrorism Act 2000 ss 1(1) and (4).
[317] This term is nowhere specified. See Dickson (2005) 14.
[318] ATCSA ss 21(2) and (4). An 'international terrorist group' is defined as a group under the control or influence of persons outside the United Kingdom, which the Secretary of State suspects to be concerned in the commission, preparation or instigation of acts of international terrorism. See ATCSA s 21(3). The group does not necessarily have to be proscribed by official proclamation. See Walker (2005) 55.
[319] ATCSA s 23.
[320] *Soering v UK*, (1989) 11 EHRR 439, 468-69. See also Warbrick (2004) 1008-10.

lack of a state willing to receive the 'terrorist' or the lack of travel documents.[321] Detainees were, however, able to end their detention at any time by agreeing to leave the country.[322]

The ATCSA provided for the right of appeal to the 'terrorist' certification,[323] as well as mandatory review thereof.[324] The sole tribunal dealing with appeal and review was the Special Immigration Appeals Commission (SIAC).[325] SIAC is presided over by a judge and its other members are appointed by the Lord Chancellor. SIAC may therefore be called independent.[326] SIAC could order the cancellation of a 'terrorist' certification after reviewing the merits, namely when it found that there were no reasonable grounds for the Secretary of State's suspicion.[327] While this suggested adequate competency to order release, the Secretary of State could circumvent cancellation by the issuance of a new certificate.[328]

SIAC's proceedings are civil and restrict the detainee's right to participate in oral hearings and calling witnesses.[329] Furthermore, counsel may be assigned and the detainee excluded from SIAC proceedings.[330] Hence, criticism was raised with regard to the fairness and appropriateness of SIAC's procedures since it was designed to review deportation cases and not decisions on indefinite detention.[331] Instead, the

---

[321] Gearty '11 September 2001, counter-terrorism, and the Human Rights Act' (2005a) 32 *J of L and Society* 24 and Walker (2005) 54.
[322] The Human Rights Act 1998 (Designated Derogation) Order 2001 No 3644.
[323] In the first three months following issuance of the certification or with leave of the competent tribunal. See ATCSA s 25.
[324] ATCSA s 26 prescribes initial review six months after the issuance of the certification and periodical review every three months thereafter.
[325] ATCSA ss 25 and 26. See also Walker (2005) 56-57.
[326] Special Immigration Appeals Commission Act 1997 (SIAC Act).
[327] ATCSA ss 25 and 26. In the case of an appeal under s 25(2)(b) SIAC may also order cancellation if 'it considers that for some other reason the certificate should not have been issued'. Cancellation deprives detention of its legal basis and immediate release should follow.
[328] ATCSA s 27(9). See also Walker (2005) 56.
[329] UK House of Commons, Constitutional Affairs Committee *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* 7th Report of Session 2004-05 Vol I (2005) 15.
[330] SIAC Act s 6. See also Warbrick (2004) 1010.
[331] UK House of Commons (2005)15-16.

safeguards of criminal process would have been more appropriate to the seriousness of such a grave infringement of the right to liberty like indefinite detention.[332]

The Secretary of State has certified and detained seventeen persons under ATCSA, relying on classified intelligence reports.[333] Two of them left the country voluntarily, one person has been released, another one has been released on bail due to his deteriorated state of mental health[334] and one person was detained in a secure mental hospital.[335] The rest were held at high security prisons.[336] Although the dimension of preventive detention practices and norms in the UK was less grave than in the USA,[337] they were still draconic and contravened international human rights standards, since they permitted indefinite detention based on the executive's mere suspicion justified on a low burden of proof, in secret proceedings and based on dubious intelligence.[338]

3.2.2. Justification: derogation from human rights treaties

The UK government, however, acknowledged this contravention and tried to circumvent it by availing itself of the right to derogate according to art 4 ICCPR and art 15 EuCHR.[339] The UK fulfilled the procedural requirements of official proclamation of a state of emergency and timely notification of the relevant organs, including sufficient information about the emergency, the derogated provisions and the reasons therefore.[340] While the notifications did not designate a possible end of the

---

[332] UK House of Commons (2005) 16.
[333] Secretary of State for the Home Department *Counter-terrorism powers: reconciling security and liberty in an open society: a discussion paper* Cm 6147 (2004) 7 and 10. There was even concern that some of the evidence had been obtained by torture. See Warbrick (2004) 1010-11 and Walker (2005) 69.
[334] Caused by the indefinite character of the detention. See *G v Secretary of State for the Home Department* [2004] 1 WLR 1352. See also Walker (2005) 69.
[335] Warbrick (2004) 1011.
[336] See for further developments ch 3.2.3. below.
[337] Gearty (2005a) 24-25.
[338] Lord Scott of Foscote stated that '[i]ndefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated […]with Soviet Russia in the Stalinist era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom'. See *A v Secretary of State of the Home Department* [2005] 2 AC 68 (HL) 148-49. Cf also Warbrick (2005) 1013.
[339] Council of Europe (2001) 465-66. The UK was the only European country to make a derogation under the EuCHR.
[340] Cf ch 2.3.3.

state of emergency, the UK indicated that the domestic norms necessitating the derogation are temporary in nature.[341] The relevant provisions authorising indefinite detention without trial[342] was set to expire after an initial period of 15 months.[343] Thereafter, it would have been up to the Parliament to renew the provision annually.[344]

The UK government has abided by its obligations under international human rights treaties, at least procedurally.[345] One factor for that may have been its membership in the regional European human rights system, whose court can enforce human rights in member states by legally binding judgments.[346] Hence, the UK faced higher pressure than the USA, should it not play by the rules.[347]

The UK's reasoning, however, resembles the arguments brought forward by the USA. Although the UK did not argue that it was at 'war' with terrorism,[348] it stated a threat to its national security and the life of the nation, caused by foreign nationals' presence in its territory, who were involved in international terrorism.[349] The UK administration also emphasized the novelty of the dangers of global terrorism.[350]

Detention without trial of aliens was also justified as being necessary to contain the perceived threat of international terrorism.[351] The detention powers under ATCSA

---

[341] Council of Europe (2001) 466.
[342] That is ATCSA ss 21-23.
[343] ATCSA s s29(1) and (7).
[344] ATCSA ss 29(2) and (3).
[345] The substantive requirements will be dealt with in the section.
[346] Jacobs 'The European Convention on Human Rights' in Bernhardt and Jolowicz *International enforcement of human rights* (1987) 40.
[347] The USA is party to the ICCPR, which rests on cooperation and a 'name, shame and blame' mechanism. See Abramson 'The CRC rights of babies and children: three key issues' (2004) Committee on the Rights of the Child, Day of General Discussion "Implementing Child Rights in Early Development" 17 September 2004, Palais Wilson, Geneva (rev.1).
[348] Warbrick (2005) 1011.
[349] The Human Rights Act 1998 (Designated Derogation) Order 2001 No 3644. See further Secretary of State for the HomeDepartment (2004) 2. See also Warbrick (2005) 1012 and Gearty (2005a) 26.
[350] Home Secretary Blunkett called this threat 'something totally different and far more elusive'. See Speech at Harvard Law School, 8 March 2004, available at www.homeoffice.gov.uk/docs3/hs_speech_harvard04.html (accessed on 5 February 2006). See also Dickson (2005) 14.
[351] 'Strictly required by the exigencies of the situation', in the language of the Human Rights Act 1998 (Designated Derogation) Order 2001 No 3644.

were deemed necessary to close a gap in British law, which would tie the administration's hands in protecting the nation from the new threat.[352] Without the power, the UK could not have done anything against suspected foreign nationals, when there were either said obstacles to deportation or not enough evidence to initiate criminal proceedings.[353]

3.2.3. The judiciary: the House of Lords decision in *A v Secretary of State of the Home Department*[354]

When litigation over the derogation's compatibility with the EuCHR reached the Appellate Committee of the House of Lords after three years, the bench 'rode a coach and horses'[355] through the policy of indefinite detention without trial of aliens.

In the first place, the majority of the court upheld the government's determination of a state of emergency.[356] Their reasoning stressed the pre-eminently political character of a declaration of emergency and the following derogation.[357] Such a political question rightly fell into the competence of the political organs that is the executive and the parliament.[358]

The House of Lords disagreed with the government's assertion that the detention powers were strictly required by the situation.[359] The court ruled that the measure was unnecessary and disproportionate. Because it only targeted non-nationals, s 23 of the ATCSA did not offer protection from the similar threat of international terrorists who were British nationals.[360] Furthermore, the law allowed terrorist suspects to escape

---

[352] Gearty (2005a) 25.
[353] Warbrick (2004) 1008.
[354] [2005] 2 AC 68 (HL).
[355] Dickson (2005) 19.
[356] *A v Secretary of State* [2005] 2 AC 68 (HL) 69. See also Dickson (2005) 20 and Ramraj, Hor and Roach 'Postscript: some recent developments' in Ramraj, Hor and Roach *Global anti-terrorism law and policy* (2005) 626.
[357] *A v Secretary of State* [2005] 2 AC 68 (HL) 101. See also Dickson (2005) 20.
[358] *A v Secretary of State* [2005] 2 AC 68 (HL) 101. See also Walker (2005) 64-65.
[359] *A v Secretary of State* [2005] 2 AC 68 (HL) 111. See also Dickson (2005) 22.
[360] Who were not subject to indefinite detention under s 23 ATCSA. See *A v Secretary of State* [2005] 2 AC 68 (HL) 103-04.

detention by leaving the country, enabling them to pursue their activities from abroad.[361]

The House of Lords also found that indefinite detention of non-citizens was discriminatory and as such prohibited by international law.[362] The different treatment of alien and 'British' international terrorists constituted an unlawful discrimination, which violated art 14 EuCHR[363] and art 4 ICCPR.[364] Discrimination based on nationality in this case was found to be as irrational as discrimination based on religion, colour or sex.[365] According to this reasoning, nationality could not indicate the dangerousness of a person at all.

This landmark judgment implied that indefinite detention under s 23 of the ATCSA amounted to arbitrary detention prohibited by international law, because of its lack of necessity, its disproportionality and its discriminatory nature. Accordingly, the House of Lords quashed the derogation order and declared the incompatibility of the ATCSA detention powers.[366] On 16 March and 8 April 2005 respectively, the Parliament repealed both the provision and the order.[367] The court could not, however, order the release of the detainees.[368] The last eight detainees were released on bail including conditions of electronic tagging and curfews in March 2005.[369]

The detention powers were replaced with less intrusive measures such as house arrest, restrictions on movement or place of residence and imposing reporting

---

[361] *A v Secretary of State* [2005] 2 AC 68 (HL) 103.
[362] *A v Secretary of State* [2005] 2 AC 68 (HL) 124. See also Dickson (2005) 23.
[363] Which proscribes discrimination, *inter alia* on grounds of national origin. While art 14 is, in principle, derogable, since it is not listed under non-derogable rights, no such derogation was advanced by the British government.
[364] Art 4 expressly prohibits derogation measures which involve discrimination based on race, colour, sex, language, religion or social origin. See *A v Secretary of State* [2005] 2 AC 68 (HL) 125.
[365] *A v Secretary of State* [2005] 2 AC 68 (HL) 149-50.
[366] *A v Secretary of State* [2005] 2 AC 68 (HL) 127.
[367] Prevention of Terrorism Act 2005 s 16(2) (repeal of s 21-32 ATCSA) and Human Rights Act 1998 (Amendment) Order 2005 SI 2005 No 1071 (withdrawal of the derogation).
[368] Dickson (2005) 20.
[369] 'Eight terror detainees released' *BBC News* 11 March 2005, available at http://news.bbc.co.uk/1/hi/uk/4338849.stm (accessed on 11 February 2006).

duties.[370] It should further be noted that post-9/11 legislation extended the permissible period of pre-trial detention in ordinary criminal cases involving suspicion of terrorism from seven up to fourteen days.[371] This change in law raises serious concerns regarding the prohibition of arbitrary detention[372] and, moreover, is permanent, since it has no sunset clause like the repealed ATCSA provisions that were temporary in nature.[373]

3.3. Israel

The third state reviewed is involved in the core conflict of the Middle East, which is also the underlying conflict for Arab-islamic terrorism. Israel experienced terrorist violence from the beginning of its existence, while its present-day territory was plagued by terrorism even before that date.[374] Since the *al-Aqsa intifada* commenced in 2000, Israel is one of the terrorism hotspots in the world, with suicide bombings being a common daily threat.[375]

3.3.1. The Incarceration of Unlawful Combatants Law, 5762-2002

Despite the fact that Israel was under heavy terrorist fire, a bill allowing indefinite detention of designated 'unlawful combatants' stalled in the Knesset in 2000, due to heavy local and international criticism.[376] The bill was reintroduced in early 2002, shortly after the USA announced its policy of treating Guantanamo detainees as 'unlawful combatants'.[377] This time, the law passed the Knesset and was adopted in

---

[370] Prevention of Terrorism Act 2005 s 4. See also Ramraj, Hor and Roach (2005) 626-27.
[371] Criminal Justice Act 2003 s 306. See also Dickson (2005) 24.
[372] In *Brogan v UK* (1988) 11 EHRR 114 the EurCtHR found a period of six days and four hours of administrative detention without possibility to challenge detention in violation of art 5(3) of the EuCHR.
[373] Dickson (2005) 24.
[374] See for a brief history Bhoumik (2005) 321-23.
[375] Cf Schulhofer 'Checks and balances in wartime: American, British and Israeli experiences' (2004) 102 *Michigan LR* 1931.
[376] Mariner 'Indefinite detention of terrorist suspects' (2002b) *Find Law's Writ*, 10 June 2002 and Human Rights Watch 'Israel: opportunistic law condemned' (2002a) 7 March 2002. See for the background of the bill
[377] Mariner (2002b) and Human Rights Watch (2002a). See also Cainkar 'Introduction: global impacts of September 11' (2004) 24 *Comparative Studies of South Asia, Africa and the Middle East* 159.

March 2002, leaving way to the observation that Israeli decision makers hopped on the American 'war on terrorism' train to reach this result.[378]

An 'unlawful combatant' is defined as a person, who has participated, directly or indirectly, in hostile acts against Israel or a person, who is a member of a force perpetrating hostile acts against Israel.[379] This is again an overly broad definition, which would for example include a person working in a medical hospital run by *Hamas*.[380] The legally binding designation, whether a particular force is engaged in hostile acts against Israel and whether hostile activity has ceased or not, is incumbent upon the Minister of Defence.[381] The law is applicable to anyone, regardless of citizenship or nationality.[382]

The power to detain is vested in the Chief of the General Staff of the Israeli Defence Forces (IDF), who may order the detention of a person if he or she believes on a reasonable cause standard that a person is an unlawful combatant and release will harm state security.[383] The detainee must be informed of the grounds for the detention as soon as possible and is granted to make a submission challenging the order.[384] This first right to challenge detention is meaningless, since the review of the submission is conducted by the Chief of General Staff, the same person that ordered the detention in the first place.[385]

Judicial review before a District Court judge must be awarded within fourteen days after the order has been issued.[386] The court is competent to quash the incarceration order, if it determines that the person is no unlawful combatant or if

---

[378] Gregory 'Palestine and the "war on terror"' (2004) 24 *Comparative Studies of South Asia, Africa and the Middle East* 192.
[379] Incarceration of Unlawful Combatants Law (IUCL), 5762-2002 art 2.
[380] Btselem.org *Position paper on the proposed law: Imprisonment of Illegal Combatants* (2000) 4.
[381] The Minister's decision shall be regarded sufficient proof in any legal proceedings, unless proved otherwise. See IUCL, 5762-2002 art 8 and Btselem.org (2000) 5-6.
[382] Btselem.org (2000) 1.
[383] IUCL, 5762-2002 art 3(a).
[384] IUCL, 5762-2002 art 3(a) and (c). See also Btselem.org (2000) 2.
[385] IUCL, 5762-2002 art 3(c).
[386] IUCL, 5762-2002 art 5(a).

release will not harm state security.[387] Based on the latter finding or other special grounds, the District Court judge may cancel the detention order in mandatory biannual review proceedings.[388] Appeals to the District Court's judgment may be brought before the Israeli Supreme Court.[389]

Judicial review hearings under this law must, however, generally be closed to the public (*in camera*).[390] The law permits withholding of evidence from the defence on grounds of state or public security[391] and the appointment of counsel by the state.[392] Furthermore, the burden of proof is shifted to the detainee, since the law presumes that the release of any designated unlawful combatant is *per se* deemed harmful to state security, unless proved otherwise.[393]

The Israeli law resembles the substance of the US' 'enemy combatant' approach, that is the unilateral administrative designation of a category, which does not exist in international law, and resulting in indefinite detention for designated individuals. The Israeli law also causes the same problems with regard to minimum standards of international law, since it likewise permits preventive detention on the executive's say so, with proper judicial review hampered by limitations on fair procedure.

3.3.2. Justification: persisting state of emergency

Art 1 of the IUCL emphasizes that it

> 'is intended to regulate the incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law.'

---

[387] IUCL, 5762-2002 art 5(a).
[388] IUCL, 5762-2002 art 5(c). See also Btselem.org (2000) 2.
[389] IUCL, 5762-2002 art 5(d).
[390] IUCL, 5762-2002 art 5(f).
[391] IUCL, 5762-2002 art 5(e).
[392] IUCL, 5762-2002 art 6(b).
[393] IUCL, 5762-2002 art 7. See also Btselem.org (2000) 5.

It is, however, not discernable, how the unilateral creation of a special category unknown to it, can be in conformity with international humanitarian law.[394]

While the general justification for indefinite detention is similar to the US reasoning of exceptional circumstances, state of emergency and necessity of the measure, the case of Israel also indicates the permanence of the exception. With regard to international human rights law, Israel has entered a reservation to art 9 to the ICCPR, exempting it from the prohibition of arbitrary detention.[395] The reason therefore was that Israel deemed itself in a persisting state of emergency.[396]

3.3.3. The Judiciary: between deference and progress

The judiciary has not yet voiced dissent with the IUCL. It remains to be seen in which direction the courts will head: will they fall back to their general deference towards the executive in matters of national security?[397] Or will the judiciary maintain its progressive trend that everything is justiciable?[398] In the Supreme Court's landmark decision prohibiting the use of torture by security forces in any circumstances in *Public Committee Against Torture v Israel*[399] Justice Barak commented famously, that

> '[t]his is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand.'[400]

---

[394] Cf Btselem.org (2000) 4.
[395] The reservation is available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (accessed on 6 Februray 2006) See also Gross (2001) 765. An examination of the validity of the reservation would go beyond the scope of this thesis. See generally on reservations to human rights treaties Korkelia 'New challenges to the regime of reservations under the International Covenant on Civil and Political Rights' (2002) 13 *European J of International L* 437 and Coccia 'Reservations to multilateral treaties on human rights' (1985) 15 California Western International LJ 1.
[396] See the reservation (fn 395 above). See also Gross (2001) 765.
[397] See Schulhofer (2004)1923 and Gross (2001) 758-61.
[398] *Zharzhevski v Prime Minister*, HC 1635/90, 48(1) PD 749, 855-57. See also Schulhofer (2004) 1923 and Gross (2001) 758.
[399] HCJ 5100/94 (1999) 53(4) PD 817.
[400] *Public Committee Against Torture v Israel*, 53(4) PD 817, 37.

Recently, the Supreme Court struck down a military order that allowed for detention without trial for up to eighteen days of 'unlawful combatants' captured in the West Bank.[401] While the executive claimed national security arguments similar to those of the US government, the Supreme Court found that fundamental human rights required prompt review of detention by an independent judicial authority.[402] The Supreme Court ruled that even an alleged unlawful combatant had to be brought promptly before a judge.[403] While the court conceded that arrests made in combat zones warrant delays, judicial review had to commence within 48 hours after the detainee has been removed from the combat zone, because the practical constraints of warfare are no longer relevant after removal.[404]

These judgments suggest that the Israeli judiciary is assuming a strong and independent role towards the executive's national security measures. In practice, however, judgments are still highly deferential.[405] Although courts do review detentions on their merits, suspects are rarely released.[406]

3.4. Other countries

The employment of detention without trial as anti-terrorism measure is not confined to the three cases surveyed above. A number of other countries from all over the world have introduced laws empowering the executive to detain terrorist suspects.[407] These approaches show similarities in their substance as well as in their justification, although they may differ in dimension and scope.[408]

---

[401] *Marab v IDF Commander in the West Bank*, 57(2) PD 349. See on the order Schulhofer (2004) 1922-23.
[402] *Marab v IDF Commander in the West Bank*, 57(2) PD 349 para 31.
[403] *Marab v IDF Commander in the West Bank*, 57(2) PD 349 paras 26 and 27.
[404] *Marab v IDF Commander in the West Bank*, 57(2) PD 349 paras 30 and 46. See also Schulhofer (2004) 1928-29.
[405] Schulhofer (2004) 1925.
[406] Schulhofer (2004) 1925.
[407] Lawyers Committee for Human Rights *Assessing the new normal: liberty and security for the post-September 11 United States* (2003) 75.
[408] Cf Jimeno-Bulnes (2004) 237.

States permitting indefinite detention on executive say-so include such diverse countries as Egypt and Canada. In February 2003, Egypt extended an emergency law set to expire in May 2003, which permits the government to detain persons believed to be a threat to national security for 45 days without charge.[409] In fact, the law allows for indefinite detention, since the 45-day period is infinitely renewable.[410] The power has been used in Egypt frequently.[411] The Egyptian Prime Minister justified the extension of detention powers with its urgent necessity in the ongoing 'war on terrorism'.[412] Furthermore, he cited US and British practices and norms regarding indefinite detention in support, which adopted principles adhered to in Egyptian emergency law.[413]

Canada resorts to indefinite detention without trial under its immigration laws,[414] targeting non-nationals in two ways. Firstly, an alien may be detained by an immigration officer, if he or she is deemed a danger to the public on reasonable grounds[415] Initial review of the reasons for detention is due after 48 hours, but is conducted by the Immigration Division itself rather than an independent court.[416] Thereafter, detention must be reviewed by the Immigration Division every thirty days and may be renewed indefinitely.[417]

Secondly, the Ministers of Immigration and the Minister of Public Safety and Emergency Preparedness respectively may certify a non-national on security grounds[418] and warrant the person's temporally unlimited detention.[419] Both the

---

[409] Lawyers Committee for Human Rights (2003) 75 and Human Rights (2003) 12.
[410] Lawyers Committee for Human Rights (2003) 75 and Human Rights Watch (2003) 12.
[411] Human Rights Watch (2003) 12.
[412] Lawyers Committee for Human Rights (2003) 75.
[413] President Mubarak said in December 2001 that '[t]here is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual.' See Human Rights Watch (2003) 12. See also Lawyers Committee for Human Rights (2003) 75-76.
[414] Immigration and Refugee Protection Act, RSC 2001, c 27 (IRPA).
[415] IRPA s 55.
[416] IRPA s 57(1). See also Roach 'Canada's response to terrorism' in Ramraj, Hor and Roach *Global anti-terrorism law and policy* (2005) 523.
[417] IRPA s 57(2). See also Roach (2005) 523.
[418] IRPA s 77(1).

certification and the detention are subject to review by the Federal Court, with initial review of the latter due after 48 hours and biannually thereafter.[420] However, fair proceedings are hampered by the executive's right to withhold evidence for reasons of national security.[421]

Both methods of indefinite detention without trial were used in some cases.[422] Indefinite detention under a security certificate was upheld by the Federal Court of Appeal, because 'the threat of terrorism […] does not represent a situation of normality, at least not in our country.'[423]

Other states resorted to detention without trial, but limited the permissible duration of detention. For example, Pakistan adopted a new Anti-Terrorism Ordinance in November 2002, which authorizes the detention of terrorist suspects for the maximum period of one year without charge or trial.[424] Almost the same lengthy period for detention without trial is envisaged in Uganda. The Anti-Terrorism Act, 2002 defines terrorism broadly and turns terrorism into a capital offence, over which the Ugandan High Court has exclusive jurisdiction.[425] The Ugandan constitution allows detention without trial of up to 360 days in cases over which the High Court has the sole jurisdiction.[426] Read in combination, suspected terrorists may be subjected to preventive detention for almost a year.

---

[419] If they have reasonable grounds 'to believe that the permanent resident is a danger to national security or to the safety of any person'. IRPA s 82(1).
[420] IRPA ss 83(1) and (2).
[421] Roach (2005) 524-25.
[422] Roach (2005) 523-24 and 526. See also Ramraj, Hor and Roach (2005) 628.
[423] *Charkaoui v Canada (Minister of Citizenship and Immigration)* 2004 FCA 421 para 84. However, *Charkaoui* was released after 21months of detention without trial, because his dangerousness was found to have been neutralized. Nevertheless, his release was subject to strict conditions, such as bail of 50000 CAN$, movement restrictions, surrender of his passport and other travel documents and a prohibition to use cell phones or computers. See *Re Charkaoui* 2005 FC 248 paras 77, 85 and 86. See also Ramraj, Hor and Roach (2005) 628-29.
[424] Lawyers Committee for Human Rights (2003) 75.
[425] Anti-Terrorism Act, 2002 s 7. For example, the definition expressly includes *inter alia* illegal import or sale of firearms and illegal possession of explosives or ammunition See also Bossa and Mulindwa *The Anti-Terrorism Act, 2002 (Uganda): human rights concerns and implications*, paper presented to the International Commission of Jurists, 15 September 2004 1-2.
[426] Constitution of the Republic of Uganda, adopted 22 September 1995 s 23(6)(c). Sufficient evidence needs to be available just after the 360 day period. Although the prosecutor must bring the detainee before a magistrate every two weeks, reference to still pending investigation generally satisfied the court

Finally, a third group of states maintains detention powers that seem rather modest in the first place, but still contravene minimum standards of international human rights law. Japan, for example, allows detention of up to 23 days until an indictment must be made.[427] Indonesia introduced anti-terrorism powers authorizing 7 days of detention without trial on grounds of strong suspicion based on preliminary evidence, which may consist of intelligence reports.[428]

4. Towards a new rule? –detention without trial in the 'war on terrorism' and its effects on international law

The usage of detention without trial, sometimes indefinitely, in current anti-terrorism efforts contravenes existing rules of international law. While attempts to hide violations of international law norms tend to reinforce their authority,[429] the pattern of detention without trial depicted above was exercised and even justified in public. This public display may dilute the authority of existing rules and lead to new rules, which render the existing ones obsolete. This chapter examines the question, whether the pattern of detention without trial in the current 'war against terrorism' diminishes the value of the existing norm prohibiting such detention: Are we heading towards a new rule?

4.1. The process of norm changing in international customary law

International customary law is generally formed by constant, uniform state practice and *opinio iuris*, which means a sense of legal obligation.[430] Only practice

---

to grant further remand. See Human Rights Watch *State of pain: torture in Uganda* (2004) vol 16 no 4(A) 16 and 67-68.

[427] Fenwick 'Japan's response to terrorism post-9/11' in Ramraj, Hor and Roach *Global anti-terrorism law and policy* (2005) 333.

[428] Anti-Terrorism Law no 15/2003 arts 26 and 28. See also Juwana 'Indonesia's anti-terrorism law' in Ramraj, Hor and Roach *Global anti-terrorism law and policy* (2005) 298.

[429] *Nicaragua Case (Nicaragua v US)* (1986) ICJ Rep 98.

[430] Statute of the International Court of Justice, 59 Stat 1031 (1945) art 38(1)(b) and *Asylum Case (Columbia v Peru)* 1950 ICJ Rep 276-77. See also Brierly *The law of nations: an introduction to the international law of peace s* (1963) 59 and Brownlie *Principles of public international law* (2003) 7-10.

accompanied by such a legal belief is relevant.[431] Evidence for state practice and *opinio iuris* can be found in treaties, court decisions and domestic legislation, diplomatic correspondence and the practice of international organizations.[432] Executive acts and statements and orders to military and naval forces may also indicate evidence for state practice and *opinio iuris*.[433]

The formation of custom is accomplished through an active and a passive component. The active part involves states who engage in certain behaviour, based on their belief that such behaviour is lawful. Omission, however, may also constitute action in a negative way, showing that states feel obliged not to engage in certain behaviour. States, which remain passive, may legitimize the activity of other states by way of acquiescence, that is to demonstrate implied consent by staying silent.[434] The formation of customary rules involves a temporal element demanding that the usage is repeated over time.[435]

Proof of rules of international customary law is often difficult, given the ambiguity of state actions and, even more so, the uncertainty of what states believe to be legal obligation.[436] Problems also arise with regard to uniformity of practice and the number of states participating: How much usage by what number of states suffices to establish a norm?[437]

---

[431] For example, practice based on comity must be excluded. An example is diplomatic etiquette which has been adhered to by states for centuries, but only out of practical reasons and comity rather than out of legal obligation. Hence, diplomatic etiquette creates no legal effect or rule. See Byers *Custom, power and the power of rules: international relations and customary international law* (1999) 18-19, 149 and 212.
[432] Akehurst 'Custom as a source of international law' (1974-1975) 47 *British Yearbook of International L* 1-10. See also American Law Institute (1987) para 103.
[433] Brownlie (2003) 6.
[434] See *Anglo-Norwegian Fisheries Case (UK v Norway)* 1951 ICJ Rep 138-39.
[435] Byers (1999) 160-62.
[436] See, for example, France´s task to show *opinio iuris* of states not acting (abstaining from the exercise of criminal jurisdiction in cases of ship collisions), which is merely impossible. See *Lotus Case (France v Turkey)* [1927] PCIJ 3, 28.
[437] Byers 'Power, obligation, and customary international law' (2001) 11 *Duke J of Comparative & International L* 83-84.

The answer cannot be given in absolute terms.[438] The scale of state practice and expressions of *opinio iuris* are correlated and add up to establish customary rules.[439] Mere state practice without *opinio iuris* is insufficient as well as mere *opinio iuris* without any correlating usage.[440] Instead, both of them need to be evident, but may be inversely correlated.[441] Accordingly, a high degree of one element may compensate for a low degree of the other.[442] A certain threshold must, however, be met by state practice and *opinio iuris* before a norm can be considered being part of international customary law.

An inverse correlation also exists between consistency of the usage and its repetition over time.[443] 'Extensive and virtually uniform' state practice may create or change a customary rule only after a very short period elapsed.[444] Some writers also suggest the possibility of 'instant' customary law.[445]

The process of international customary law is, however, not democratic. There is no such equality principle of 'one state, one vote' like in the UN General Assembly in this process.[446] Instead, two factors add to the weight given to a state's behaviour in the customary process.

---

[438] Cf Byers (1999) 5.
[439] Kirgis 'Custom on a sliding scale' (1987) 81 *American J of International L* 146-51.
[440] An example for the former is diplomatic etiquette. An example for the latter would be a rule, which may be accepted as such, but is never used in practice.
[441] See the sliding scale of Kirgis (1987) 150.
[442] Kirgis (1987) 149.
[443] Charlesworth 'Customary international law and the Nicaragua Case' (1984-1987) 11 *Australian Yearbook of International L* 7.
[444] *North Sea Continental Shelf Cases* 1969 ICJ Rep 43. See also Charlesworth (1984-87) 7 and Byers (1999) 160-61.
[445] Cheng 'United Nations resolutions on outer space: "Instant" international customary law?' (1965) 5 *Indian J of International L* 23 and Langille 'It's "instant custom": how the Bush Doctrine became law after the terrorist attacks of September 11, 2001' (2003) 26 *Boston College International and Comparative LR* 149-51. See also Byers (1999) 160.
[446] Charter of the United Nations, 59 Stat. 1031 (1945) art 18(1). Cf also Byers (2001) 82-83.

Firstly, states with a special interest, that is, which are especially affected by an issue to be regulated, gain more significance than states with a lesser interest.[447] The second factor increasing a state's weight in the customary process is power, as Kelsen stated:

> '[I]n fact, in order to be able to consider that a norm is applicable in state practice as a norm of customary international law, it is enough if it has been applied or recognized in numerous cases by those states which by reason of their size and their culture are the most important for the development of international law.'[448]

The significance of powerful states has not only developed historically,[449] but may also be derived from functional considerations: powerful states are in a comparatively better position to effectively display state practice and their belief of what the law is.[450] They can act much more effectively, since they possess the means to act with great frequency on the international plane, to impose their will and thereby shape customary rules.[451]

De Visscher illustrated the customary process as the gradual formation of a path across vacant land, among whose users there

---

[447] *North Sea Continental Shelf Cases* 1969 ICJ Rep 43. See also Stern (2001) 103. Landlocked states have, for example, significantly lesser weight in customary law regarding marine delimitation or fishery than coastal states.
[448] Kelsen *Théorie pure du droit* (Eisenmann, translated 1962) 260-61 cited in Stern (2001) 104.
[449] The customary law of the sea, for example, was largely created by the British Empire in the 19th century which at that time was the only superpower. See Brown 'Law of the sea, history' in Bernhardt *Encyclopedia of public international law* (2000) vol 3 170.
[450] Byers (1999) 37.
[451] For example, American state organs such as troops act on the international plane daily in multiple ways, thereby creating state practice, whereas a small and poor country like Tuvalu may find it much harder to act. Furthermore, powerful states maintain far bigger diplomatic staffs to represent their attitudes and beliefs bilaterally and in multilateral organisations, let alone their better capabilities to enforce their rights. See Akehurst (1974-1975) 23 and Byers (2001) 84. Cf also Stern (2001) 108.

> 'are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.'[452]

The above mentioned factors contribute to the emergence of a new rule in international customary law. To become valid, a rule needs to have sufficient support, whether active in constant and repeated usage and expressions of *opinio iuris* or passive in form of acquiescence.[453] Opposition and resistance, on the other hand, may prevent the emergence of a rule, depending on the nature and scale of support and objection.[454]

Norm change follows the same process with one significant difference: a rule is already in place. In the case of an emerging adversary rule, this means that the existing rule must be breached *a priori*.[455] Repeated violation of the existing rule, accompanied by a belief of legal entitlement, may lead to the replacement of the old rule.[456] Objections to the emerging rule may, however, prevent replacement and preserve the existing rule.[457] This 'derogating power of international customary law'[458] may render not only existing customary norms obsolete, but also norms of international treaty law.[459] An emerging norm does not necessarily have to substitute the old rule in its entirety. It may also modify parts of the old rule or create an exception.

States shape the rules of international law, either by the way of custom or treaty, in the constantly moving and evolving landscape of international law. Rules are constantly created, modified, abandoned or replaced. In principle, no rule is *sacrosanct*

---

[452] De Visscher *Theory and reality in public international law* (1968) 154-55. See also Byers (2001) 84.
[453] Indifference has a supporting effect, because indifferent states do not mind the rule coming into effect.
[454] If a rule comes into being which has general support, single states may 'persistently object' to this rule with the effect that they are not bound by it. See on the problem of 'persistent objectors' Akehurst (1974-1975) 23-27 and Byers (1999) 102-05.
[455] *Nicaragua Case (Nicaragua v US)* (1986) ICJ Rep 109. See also Ipsen *Völkerrecht* (1999) 196.
[456] *Nicaragua Case (Nicaragua v US)* (1986) ICJ Rep 109. See also Ipsen (1999) 196-97.
[457] Analogous to the objection preventing the emergence of an altogether new rule. See Byers (1999) 102-03.
[458] Ipsen (1999) 196.
[459] See Capotorti 'L'extinction et la suspension des traités' (1971) 134 III *Recueil des cours* 516-20 and Ipsen (1999) 179. Cf also Vienna Convention on the Law of Treaties art 64.

and unchangeable, if an overwhelming majority of states decides so, since there is no higher authority above them.[460]

Compliance with international customary law is secured by the principle of reciprocity.[461] States are rights bearers as well as duty bearers and adhere to norms because they expect others to do the same.[462] A state which claims a right under international customary law must grant the same right to any other state.[463] Furthermore, if a state breaches a rule, it faces coercive self-help measures by states who feel that they suffered a wrong.[464]

In human rights law, states are only duty bearers, because they owe the rights to individuals.[465] In case of breach the wrong is suffered by individuals rather than by other states. Hence, the principle of reciprocity is weakened significantly in the case of human rights, which makes them more vulnerable to change.

Legal scholars have tried to remedy this problem by suggesting a stronger role for international organisations, governmental as well as non-governmental, in the customary process.[466] International governmental organisations and their agencies might gain legal significance in the customary norm-creation process, because their actions constitute collective state action.[467] Statements of international governmental organisations, which are not legally binding need to be confirmed by individual state actions to gain legal significance in the customary process.[468] Otherwise they represent mere political statements.

---

[460] Even peremptory norms of international law (*ius cogens*) may be changed, albeit only by norms of the same hierarchical status. See fn 136 above.
[461] Simma 'Reciprocity' in Bernhardt *Encyclopedia of public international law* (2000) vol 4 29-30.
[462] Simma (2000) 29-30.
[463] Byers (1999) 90.
[464] Kelsen (1960) 321-324 and Simma (2000) 32.
[465] Cf Gunning 'Moderinizing customary international law: the challenge of human rights' (1991) 31 *Virginia J of International L* 211.
[466] Gunning (1991) 221.
[467] Gunning (1991) 222-23.
[468] Gunning (1991) 223.

Although non-governmental organisations (NGOs) may in fact exercise considerable influence on the creation of international customary law, this influence can only ever be indirect and must be channelled through the states.[469] The influence of NGOs on norm creation is accordingly a matter of political science rather than international law. If there has been a trend to increase the significance of international organisations in the customary process, this was reversed by the resurrection of state centric relations ('*Wiedererstarken des Staates*') caused by the events of 9/11.[470]

4.2. What would the new rule be?

When a new rule emerges, this rule needs to be articulated and identified to prove the rule's validity and, in the case of substitution, to compare its validity with the old rule. Accordingly, the question of what the new rule would be must precede the examination of whether we are heading towards a new rule in international law.

In the case of detention without trial and terrorism, the practice violating the existing rule was started by the USA. While detention without trial was used in anti-terrorism before, the resolute advocacy of the world's single super power endowed detention practices with new legitimacy. The example given by the 'shining city upon a hill'[471] was actively followed by many other states as shown above.

States violated the prohibition of arbitrary detention established in international human rights and humanitarian law repeatedly and openly. The prohibition encompasses detention without trial, when minimum standards of judicial review are not adhered to. Other states also adopted US justifications for the adverse practice, hence displaying their belief that they were legally entitled to act as they did. In the metaphor of de Visscher, the USA stamped out a new path with its giant feet on which

---

[469] Cf Gunning (1991) 227-30.

[470] See Spanger *Die Wiederkehr des Staates: Staatszerfall als wissenschaftliches und entwicklungspolitisches Problem* (2002) HSFK-Report 1/2002 1-3. The administration of US President Bush is a paradigmatic example for this reverse trend. Pre-9/11 the government drifted lacking direction, whereas it acted with strong determination after 9/11.

[471] For example, the former President Ronald Reagan emphasized that 'America is a shining city upon a hill whose beacon light guides freedom-loving people everywhere'. See http://www.sourcewatch.org/index.php?title=America_is_a_shining_city_upon_a_hill (accessed on 13 February 2006). See also and more generally Davis and Lynn-Jones 'City upon a hill' (1987) 66 *Foreign Policy* 20-38.

the others could follow.[472] The more the well paved path of detention without trial in the 'war on terrorism' was used by others, the more the old path prohibiting detention without trial would be abandoned and go rack and ruin.

The assumed new rule in this case does not render the prohibition of arbitrary detention *per se* obsolete, but rather creates an exception to the existing rule. The executive either pushed empowering laws through the legislative process or adopted executive decrees permitting detention. On executive officials is bestowed the competence to certify or designate persons belonging to a special category, however that is called. The threshold for such an administrative decision is low. Reasonable belief or suspicion on the respective executive official's side is sufficient proof. Belief may be based on intelligence or even hearsay, rather than a chain of evidence based on proven facts. Moreover, conditions for designation are extremely vague, which offers the designator a wide margin of appreciation and leads to arbitrary and indiscernible results.[473]

Consequences of designation are, however, harsh, since it strips individuals of some, if not all, of their rights and puts them into what was called a 'legal blackhole'.[474] One consequence is prolonged or even indefinite detention.[475] Detainees are deprived of the right to personal liberty without being charged of an offence and having their guilt established under minimum standards of due process. Access to counsel, the opportunity to defend themselves and to appeal against the executive's decision before an independent and competent tribunal, are seriously hampered, if not denied altogether. The judicial organs are circumvented and the rule of law is replaced by administrative discretion, which is driven politically rather than legally. Detainees

---

[472] Cf ch 4.1. above.
[473] In the USA some US citizens captured in Afghanistan were subjected to regular criminal proceedings, while others were declared 'enemy combatants'. Cf Lawyers Committee for Human Rights (2003) iii.
[474] See *Abbasi v Secretary of State for Foreign and Commonwealth* (2002) EWCA Civ 1598 para 64. See also Klug 'The rule of law, war, or terror' (2003) 2003 *Wisconsin LR* 383, Wilde (2005) 772 and Steyn (2004) 1.
[475] Other consequences may be subjecton to interrogation procedures including serious ill-treatment or even amounting to torture, deportation or forfeiture of assets.

are put beyond domestic and international law, whereas the state is not bound by law anymore: this creates the 'legal blackholes' referred to.

The justification for the new exception is rooted in the paradigm of the 'war on terror'. The situation created by post-9/11 terrorism is deemed to pose such an exceptional threat that it amounts to a warlike state of emergency. In the face of this emergency, upholding everyone's basic rights is seen as luxury which cannot be afforded. Instead individual rights in concrete cases are trumped by alleged necessities to pursue the abstract goal of national security.

The justification follows the logic of the right to derogate from obligations in human rights treaties, according to which states may suspend obligations to avert their demise or serious harm to the public during emergencies. The 'legal blackhole' approach, however, differs from permissible derogation insofar as it is not subject to limitations. Lack of limitations is especially striking with a view to temporal limits: the nature of the 'war on terrorism' is inherently indefinite, turning the state of emergency into a permanent situation, which was called the 'new normal'.[476]

4.3. Other states' reactions

As demonstrated above, a number of states copied US detention practices and justifications and, therefore, contributed actively to support the new rule. To establish whether there is a tendency towards general acceptance of the rule, reactions of states not engaging in the practice need to be examined: are other states objecting, showing indifference or even support?[477]

In general, states displayed overwhelming general support for the USA following 9/11.[478] The 'war on terrorism' was widely accepted to constitute a major feature of the contemporary international situation. The means employed to fight this 'war', however, differ.

---

[476] Didion 'Politics in the "new normal"America' (2004) 51 *New York Review of Books* no 16, 21 October 2004 and Lawyers Committee for Human Rights (2003) i.
[477] Cf Roberts (2004) 730.
[478] Langille (2003) 154-56. For the EU see Jimeno-Bulnes (2004) 236.

The practice of detention without trial has not provoked an outcry in other states. Instead, states voiced modest criticism calling for adherence to minimum standards of international law.[479] France, for example, reiterated its view that detainees at Guantanamo Bay should be treated in accordance with international law without referring particularly to the practice of indefinite detention.[480] The British Prime Minister Blair emphasized that trials of these detainees should comply with international law, but he did not criticize the detentions as such.[481] While most state criticism was directed at the detentions at Guantanamo Bay, states did not condemn such detentions in general, for example by UN General Assembly resolution.[482] An exception is Cuba which called US detention centers at Guantanamo Bay 'concentration camps'[483] where detainees are held 'in the worst style of the Middle Ages'.[484] Cuba is, however, itself not a champion of human rights and the comments were rooted in its long standing hostility with the USA rather than in Cuba's human rights concerns.[485]

Commentators explained the lack of forthright objection to the detention practices with pragmatic political reasons, according to which states might have an adverse legal belief, but feared retribution by the USA.[486] This argumentation may also be turned upside down: states acquiesce broadly, because they share the legal belief in the new rule or are indifferent. Modest criticism is then raised from time to time to please

---

[479] See Roberts (2004) 731-32.
[480] Roberts (2004) 731-32.
[481] 408 Parliamentary Debate, HC (6th series) (2003) 1151-52.
[482] Roberts (2004) 732.
[483] Study of the United Nations High Commissioner for Human Rights *Protection of human rights and fundamental freedoms while countering terrorism* (2004) UN Doc A/59/428 para 11. See also 'Cuba calls Guantanamo "concentration camp"' *USA Today* 27 December 2003, available at http://www.usatoday.com/news/world/2003-12-27-guantanamo_x.htm (accessed on 8 February 2006).
[484] UN Doc A/59/428 para 11. In addition, Cuba's leader Fidel Castro announced that Cuba did not cash the cheques for the Guantanamo Bay lease anymore. See 'Cuba decries detainees' treatment' *BBC News* 27 December 2003, available at http://news.bbc.co.uk/2/hi/americas/3350649.stm (accessed on 8 February 2006).
[485] See UN Doc A/59/428 para 11 where Cuba stated that 'ultrareactionary, militarist and fascist circles working with the Government of the United States have manipulated the expression of international solidarity with the people of the United States to try to impose a hegemonic dictatorship of global reach.'
[486] Roberts (2004) 732.

domestic electorate audiences critical of the US approach. One way or another, substantial objections raised by states in the international arena are not visible.

Some European states showed implicit support for administrative detention of terrorist suspects when they sent interrogators to Guantanamo Bay. Germany sent investigators of its secret services to the military camp to interrogate inmates.[487] The interrogations were justified by the government on grounds of preventing terrorist attacks in Germany, although it was admitted that information gathered there could not be used in court.[488] France also sent interrogators to Guantanamo Bay to gather evidence that could be used in French courts against Guantanamo Bay detainees of French nationality.[489] Belgium also sent judicial and police officers to interrogate detainees in connection with a domestic investigation in Belgium.[490]

States were also reluctant to exercise their right of diplomatic protection for detainees of their nationality.[491] A survey by the Council of Europe revealed that from seven European countries with nationals detained at Guantanamo Bay, only Denmark pushed emphatically for diplomatic protection of its citizen, 'emphasising that his indefinite detention was unacceptable'.[492] The other countries, however, requested access to their citizens and, partially, their return, but did not increase their efforts in case of denial.[493] Australia did not even demand the return of its citizens, but instead

---

[487] 'Schäuble nennt neue Details: BKA verhörte Deutschen in syrischem Foltergefängnis' *Sueddeutsche Zeitung* 15 December 2005, available at http://www.sueddeutsche.de/,tt3m2/deutschland/artikel/244/66178/ (accessed on 10 february 2006).
[488] 'Koalition verteidigt Vernehmung Gefangener in Guantanamo' *Financial Times Deutschland* 15 December 2005, available at http://www.ftd.de/pw/de/34915.html (accessed on 10 February 2006).
[489] Priest 'Help from France key in covert operations: Paris's "Alliance Base" targets terrorists' *Washington Post* 3 July 2005 A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/02/AR2005070201361.html (accessed on 10 February 2006).
[490] Council of Europe, Committee on Legal Affairs and Human Rights, Parliamentary Assembly *Report: Lawfulness of detentions by the United States in Guantánamo Bay* (2005) Doc 10497 app III para 2.
[491] Roberts (2004) 732.
[492] The Danish citizen was released in February 2004. Council of Europe, Committee on Legal Affairs and Human Rights (2005) app III paras 1 and 5.
[493] These countries include Belgium, Bosnia & Herzegovina, France, Sweden, Russia and the UK. Spain only requested access. Germany denied responsibility, because the detainee was only habitual resident in Germany, but had Turkish nationality. See Council of Europe, Committee on Legal Affairs and Human Rights (2005) app III.

embraced the US approach of trying them before military tribunals at Guantanamo Bay.[494]

According to the reactions of governments, the inter-state world seems surprisingly undivided on the critical issue of detention without trial and terrorism. Most states acquiesced, implicitly supported, embraced or even copied the post-9/11 model advanced by the USA. The lack of opposition voiced by other executives can arguably be attributed to congruent interests: why should other executives oppose a practice they can copy to equally enhance their powers?[495]

Furthermore, international human rights are structured in a way that states are only right bearers, whereas individuals are right holders. Unlike in other matters of international law, where states are both bearing and holding rights, states suffer no direct harm when human rights are violated by others.[496] While states have a bigger interest in compliance with international humanitarian law since it affects soldiers as their agents, the 'unlawful/enemy combatant' approach is directed against non-state actors and not regular soldiers.

4.4. The intra-state division: executive v judiciary

The executive is, however, not the only branch of state that is significant to the process of international customary law. The judiciary is also relevant to this process, especially with regard to *opinio iuris*, because its domestic decisions epitomise the valid interpretation of what the law is in the state. With respect to the process of international customary law, the judiciary is, however, in a disadvantaged position,

---

[494] Attorney General Philip Ruddock and Minister for Foreign Affairs Alexander Downer 'Government accepts military commissions for Guantanamo Bay detainees' *Joint news release* 25 November 2003, available at http://www.ag.gov.au/agd/www/ministerruddockhome.nsf/Page/C8E45854478FB7E0CA256DE90018ED4D?OpenDocument (accessed on 10 february 2006). See also 'Howard rules out retrospective terrorism laws' *Sydney Morning Herald* 23 February 2003, available at http://www.smh.com.au/articles/2004/02/22/1077384621312.html?from=storyrhs (accessed on 10 February 2006) and Roberts (2004) 732.

[495] Roberts (2004) 735. Cf also Thomas (2003) 1206-07 and Warbrick (2004) 1004

[496] Although human rights are owed *erga omnes*, violations hit the individual in the first place and states are much more reluctant to raise their voice than in cases involving state rights like territorial integrity. See ch 4.1. above.

since it can only react to the actions of the executive, which is always one or more steps ahead.

Historically, courts tended to defer to the executive's actions and decisions in situations of emergency. The 'judicial tradition of deference'[497] was especially apparent in times of war or when the state faced the threat of terrorism.[498]

A complete assessment of the contemporary role of the judiciary in the 'war on terrorism' is, however, not yet possible. Judicial control of governmental action is usually triggered by individuals suing the state. Not only does the procedure of filing complaints take time, but also the process until judgment is rendered. Additionally, it may take years until litigants went through all appeal procedures and a case is ultimately decided by the highest court.[499] Although post-9/11 emergency measures are now in force only around four years the longest, several cases were decided that reveal at least a trend: the judiciary is taking on an increasingly active role in opposition to the executive.[500]

The most resolute position was taken by the British House of Lords in *A v Secretary of State for the Home Department*.[501] The House of Lords decided that the government's indefinite detention of non-citizens and the underlying anti-terrorism law were in breach of the UK's obligations under international human rights law, namely the EuCHR and the ICCPR. The UK's administrative detention of terrorist suspects was found to be unnecessary and disproportionate. Furthermore, the limitation of detention to non-citizens was found to be discriminatory and therefore violating international human rights. In consequence, the judgment compelled the UK

[497] Shapiro 'The role of the courts in the war against terrorism: a preliminary assessment' (2005) 29 *Fletcher Forum of World Affairs* 105.
[498] See Benvenisti 'National courts and the "war on terrorism"' in Bianchi *Enforcing international law against terrorism* (2004) 308-25 and Rehnquist *All the laws but one: civil liberties in wartime* (1998) 4.
[499] Yin 'The role of article III courts in the war on terrorism' (2004-2005) 13 *William & Mary Bill of Rights J* 1046-47.
[500] Roberts (2004) 735.
[501] See ch 3.2.3. above.

government to modify its antiterrorism approach. Parliament subsequently repealed the norms authorizing indefinite detention and the administration released the detainees.[502]

The US Supreme Court rendered two important judgments in *Rasul* and *Hamdi*,[503] although it did not go as far as the British court. In *Rasul*, the Supreme Court upheld the government's claim to detain indefinitely and deny POW status to what it called 'unlawful combatants'. The court, however, rejected the government's claim that the 'unlawful combatants' were not entitled to judicial review of the merits of their detention before US courts, because they lack jurisdiction. Instead, it confirmed the availability of *habeas corpus* to the detainees.

The case of *Hamdi* concerned the rights of a US national who was designated an 'enemy combatant' and detained without trial by the administration. The court held in a plurality opinion that US citizens may be detained as 'enemy combatants' under the congressional authorisation to use military force in the 'war on terrorism', but that detainees must be given a meaningful opportunity to contest the factual basis of detention before a neutral decision maker. However, *Hamdi* was released and deported after he entered into an agreement with the government.

Judicial bodies of states which did not themselves resort to detention without trial also expressed serious concerns. The English and Wales Court of Appeals was called on to rule on the Secretary of State's duty of diplomatic protection towards a UK national detained at Guantanamo Bay.[504] While the court rejected the application, it found that detentions at Guantanamo Bay were objectionable.[505] Detainees were arbitrarily detained in a legal black hole which was in apparent contravention of

[502] See ch 3.2.3. above.
[503] See ch 3.1.4. above.
[504] *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* (2002) EWCA Civ 1598 para 1. See also Benvenisti (2004) 328 and Roberts (2004) 735.
[505] *Abbasi v Secretary of State for Foreign and Commonwealth* (2002) EWCA Civ 1598 para 66.

fundamental principles of international law.[506] The court further expressed hope that the US Supreme Court would take notice of its opinion.[507]

In Malawi, the High Court of Blantyre issued an injunction prohibiting the transfer into US custody of five terrorist suspects arrested by Malawi's National Intelligence Bureau in cooperation with the US Central Intelligence Agency (CIA).[508] The High Court ordered that the suspects be produced before it within 48 hours and released on bail or informed of the charges against them.[509] Nevertheless, they were transferred to US custody.[510] The detainees were released in Sudan five weeks later following clearance of their alleged connections to *Al Qaeda* by US authorities and the Malawian President apologised to them.[511]

In October 2001, Bosnian authorities arrested six Algerian men alleged to have links to *Al Qaeda*.[512] After four months, the Bosnian Supreme Court ordered their release because there was lack of evidence against them.[513] Despite this judicial order the suspects were surrendered to US troops in Bosnia.[514] In reaction, the Human Rights Chamber of Bosnia and Herzegovina issued an injunction that the suspects stay

---

[506] *Abbasi v Secretary of State for Foreign and Commonwealth* (2002) EWCA Civ 1598 paras 64 and 69.
[507] *Abbasi v Secretary of State for Foreign and Commonwealth* (2002) EWCA Civ 1598 paras 15 and 107.
[508] International Commission of Jurists 'US and Malawi: rule of law compromised in fight against terrorism' *Communique de Presse*, 27 June 2003, available at http://www.icj.org/IMG/pdf/Rule_of_Law_Compromised_270603_.pdf (accessed on 4 February 2006). See also 'US takes Malawi *Al-Qaeda* suspects' *BBC News* 25 June 2003, available at http://news.bbc.co.uk/2/hi/africa/3019876.stm (accessed on 8 February 2006).
[509] International Commission of Jurists 'US and Malawi: rule of law compromised in fight against terrorism' *Communique de Presse*, 27 June 2003.
[510] Lawyers Committee for Human Rights (2003) 82.
[511] Roth 'The law of war in the war on terror' (2004) 83 *Foreign Affairs* (online version, pages not numbered) and Lawyers Committee for Human Rights (2003) 83.
[512] 'US embassy in Bosnia says 6 *Al Qaeda* suspects sent to cuba' *Agence France Presse* 24 January 2002.
[513] Williams 'Hand-over of terrorism suspects to US angers many in Bosnia' *Washington Post* 31 January 2002.
[514] Mayer 'Outsourcing torture: the secret history of America's "extraordinary rendition" program' *The New Yorker* 14 February 2002, available at http://www.newyorker.com/fact/content/?050214fa_fact6 (accessed on 4 February 2006).

in the country for further proceedings.[515] The injunction was again ignored and the suspects transferred to Guantanamo Bay.[516] One Supreme Court judge denounced the transfer as 'extra legal procedure',[517] whereas the Human Rights Chamber complained that the ignorance of its binding decision caused irreparable harm.[518] Furthermore, the Bosnian Human Rights Chamber held that the Bosnian government violated the EuCHR's prohibition of arbitrary detention.[519]

Some courts, for example in Canada,[520] upheld the government's claims completely. Nevertheless, there is a trend to scrutinize and condemn executive action, which creates growing tension between the executive as primary actor and the judiciary as its watchdog.[521] While the inter-state world is not divided with respect to detention without trial of terrorists after 9/11, an intra-state division between governments and courts is emerging. The executive did, however, not always back down to courts' judgments, but acted in contradiction to the judicial rulings.[522] In such cases the court decisions did not end the suspects' discontent as the executive failed to follow the courts' determination.

The differing attitudes between these two branches of state raise the question of who speaks for the state in the international law arena. It is mainly the executive who engages in state practice since it generally has the prerogative in international relations and foreign policy. The judiciary, however, determines what the law is and thus is the ultimate source of *opinio iuris*. What the courts did was to declare that the practice of detention without trial was in breach of existing domestic and international law. This

---

[515] The Human Rights Chamber was established in the Dayton Accords and is closely modeled on the EurCtHR. See General Framework Agreement for Peace in Bosnia & Herzegovina, 14 December 1995, 35 *ILM* 89. See also Cornell and Salisbury 'The importance of civil law in the transition to peace: lessons from the Human Rights Chamber for Bosnia and Herzegovina' (2001-2002) 35 *Cornell International LJ* 397.
[516] Lawyers Committee for Human Rights (2003) 84.
[517] Lawyers Committee for Human Rights (2003) 84.
[518] Lawyers Committee for Human Rights (2003) 85.
[519] Lawyers Committee for Human Rights (2003) 85.
[520] See ch 3.4. above.
[521] Cf Roberts (2004) 736-37.
[522] See the Malawian and Bosnian cases above.

declaration of illegality deleted the potential to contribute to the creation of a new rule, because it stripped the practice of the *sine qua non* of accompanying *opinio iuris*.[523]

4.5. International organisations

Detention practices were criticised with determination and steadiness by international organisations, especially their human rights organs.[524] The UN Human Rights Committee bemoaned the frequent use of administrative detention in Israel[525] and the adoption of anti-terrorism legislation authorizing administrative detention in Colombia and Sri Lanka.[526] The UN Working Group on Arbitrary Detention in its annual report of 2004 disapproved of the fact that legal safeguards concerning detainees are observed only insofar as they are consistent with military security in a growing number of cases.[527] The Working Group also stipulated that the right to challenge detention may not be abrogated in any circumstances, whether conflict, war or state of exception.[528] Furthermore, the Working Group criticised detention without trial at Guantanamo Bay for its apparent lack of legal basis for the deprivation of liberty.[529] This critique was rejected by the US government with reference to the Working Group's lack of competence in areas relating to international humanitarian law.[530]

Only two months after detentions at Guantanamo Bay commenced, the Inter-American Commission on Human Rights requested preliminary measures to have the

---

[523] See ch 4.1. above.
[524] See for example the annual reports of the Working Group on Arbitrary Detention 2003-2005, UN Doc E/CN.4/2003/8 paras 59-66, UN Doc E/CN.4/2004/3 paras 50-83 and UN Doc E/CN.4/2005/6 paras 59-65. See generally Flynn (2005) 40-43.
[525] Concluding observations of the Human Rights Committee: Israel UN Doc CCPR/CO/78/ISR (2003) (Concluding Observations/Comments) para 12.
[526] Concluding observations of the Human Rights Committee: Colombia UN Doc CCPR/CO/80/COL (2004) para 9 and Concluding observations of the Human Rights Committee: Sri Lanka UN Doc CCPR/CO/79/LKA (2003) para 13.
[527] Report of the Working Group on Arbitrary Detention UN Doc E/CN.4/2004/3 para 63.
[528] Report of the Working Group on Arbitrary Detention UNDoc E/CN.4/2004/3 para 63.
[529] Report of the Working Group on Arbitrary Detention UNDoc E/CN.4/2004/3 para 69. See also E/CN.4/2003/8 and UN Doc E/CN.4/2004/3/Add.1 (Opinion No.5/2003) 33.
[530] Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights UN Doc E/CN.4/2003/G/73. See also Response of the Government of the United States UN Doc E/CN.4/2004/3 paras 16 to 20.

legal status of detainees determined by a competent tribunal and demanded that they should be granted legal protection according to their respective status.[531] The USA brushed off the request with reference to the Inter-American Commission's lack of jurisdiction in the matter.[532] No further action followed.

The Council of Europe's committee of ministers adopted guidelines on human rights and the fight against terrorism in July 2002, which emphasize the absolute necessity of respecting human rights, the rule of law and humanitarian law in the fight against terrorism.[533] The council furthermore stipulated the absolute prohibition of arbitrariness and discriminatory nature of any measures and reiterated minimum standards for the deprivation of liberty including the right to prompt judicial review.[534] On the one hand the guidelines may provide an authoritative statement of the European position on human rights and anti-terrorism, since they were adopted by the representatives of the member states.[535] Thus, they constitute a collective statement of the single member states.[536] On the other hand, the guidelines may be interpreted as a mere political statement, because they are not legally binding.[537] In addition, European state practice did not always follow the statements, thus diluting possible legal consequences.[538]

---

[531] Inter-American Commission on Human Rights (IACHR) 'Decision on request for precautionary measures (Detainees at Guantanamo Bay, Cuba)' 12 March 2002 (2002) 41 *ILM* 533-34. See also Shelton (2002) 13-14.

[532] The USA argued that the Commission had no jurisdiction to apply international humanitarian law and that it had no authority to request preliminary measures, because the USA were not a state party to the AmCHR. Furthermore, the requested preliminary measures were inappropriate and unnecessary, because the detainees' status was clear (as belonging to the US creation of 'unlwaful combatants') and there was no risk of irreparable harm to the detainees. See United States 'Response of the United States to request for precautionary measures – detainees in Guantanamo Bay, Cuba' 15 April 2002 (2002) 41 *ILM* 1015-26. See also Shelton (2002) 14.

[533] Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers at its 804th meeting (11 July 2002)H (2002) 4 Strasbourg 11 July 2002 Preamble para (d).

[534] H (2002) 4 Strasbourg 11 July 2002 arts II and VII.

[535] Gearty (2005b) 4.

[536] Cf Gunning (1991) 222.

[537] H (2002) 4 Strasbourg 11 July 2002 texts of reference, legal basis. Cf Gearty (2005b) 4.

[538] See ch 4.3. Cf also Gunning (1991) 223.

4.6. Towards a new rule? – Effects of the detention practices in international law

A new rule of international law, which creates an exception to the prohibition of detention without trial, does not yet exist. Strong evidence for such a new rule would be needed, because the prohibition of detention without trial is firmly rooted in numerous multilateral treaties and international custom of human rights and humanitarian law. In light of this, the time span of approximately five years was too short to proof convincingly the emergence of the new rule.[539]

This does not, however, mean that nothing has changed since. The prohibition of detention without trial has been violated in numerous cases in order to fight terrorism and the question about the legal impact of these violations remains: are the violations paving the way towards a new rule or are they mere breaches of existing international law?

Support for the contention that we are heading towards an anti-terrorism exception to the prohibition of detention without trial can be found in state activities and their justifications. The state directly affected by 9/11, which also happens to be the world's single superpower, led the way in changing the norm. The USA started to detain terrorist suspects without trial for an indefinite period of time and without any involvement of the judiciary. Despite the prohibition of such conduct in international law, the USA asserted the right to do so and justified it on grounds of national security and a completely different situation of emergency, which happened to be permanent by nature. The violation can be interpreted as a proposal to alter existing rules of international law.[540]

Numerous governments from different world regions copied the US approach and introduced legislation permitting detention of terrorist suspects at the executive's

[539] Cf Roberts (2004) 748.
[540] See Byers (1999) 132-33.

whim.[541] By doing so they accepted the proposal to alter the rules. This interpretation is bolstered by the fact, that these governments availed themselves of the US justifications and also adopted the US belief of legal entitlement.

It is not necessary for the establishment of a new rule of international customary law to be practiced by the majority of states.[542] General support can also be drawn from other activities showing implicit consent, as in the case of the despatch of interrogators to Guantanamo Bay.[543] It is even sufficient that only a minority engages in the usage and the majority keeps silent and approves the usage through acquiescence.

In fact, hardly any state expressed fervent and repeated objection in the case of post-9/11 detention without trial.[544] From the perspective of governments, the world shared a surprisingly undivided view on the administrative detention of terrorist suspects. No larger debate evolved around the detention practices on an inter-state level.

The struggle has instead shifted to the domestic level, where courts ruled against executive detention practices and norms.[545] The British House of Lords found indefinite detention of foreign terrorist suspects in breach of international human rights law and attained the repeal of the underlying legal provisions.[546] The US Supreme Court did, however, not render such a bold judgment. It upheld the administration's wartime power to detain 'unlawful combatants', but opened the American court system to *habeas corpus* review of the merits of such detention. Thereby, the Supreme Court rejected the administration's claim of unfettered and unreviewable power to detain. With more litigation to come, executives are likely to face growing opposition from the judicial branch.

---

[541] See ch 3.4. States included role model democracies like the UK and Canada, as well as autocratic states like Egypt and Pakistan.
[542] See ch 4.1.
[543] See ch 4.3.
[544] See ch 4.3.
[545] See chs 3.1.4., 3.2.3. and 4.4.
[546] Ch 3.2.3.

The growing opposition of domestic courts towards administrative detention of terrorist suspects slowed down the movement towards a new customary rule significantly, if not bringing it to a halt altogether. The court decisions delegitimised the executives' claims and stripped detention practices of the complementing *opinio iuris*, at least partially. Accordingly, the claims lost their legal significance and should be regarded as mere breaches of existing rules.

Nevertheless, the potential to move towards a new rule is still there. In case of another terrorist attack of the scale of 9/11, governmental reactions with harsh consequences for human rights are likely, pushing towards detention without trial with verve. The occurrence of another major terrorist attack will probably also resurrect judicial deference towards the executive.

While some states resorted to indefinite administrative detention, others limited the time period of detention. The frequent use of unlimited or long term detention by some countries has a psychological effect. In light of the more extreme measure of indefinite detention, the use of detention without trial for shorter periods looks less grave. Admittedly, the author of this thesis experienced this effect himself in the writing process.

This psychological effect is likely to facilitate the extension of the time limits of reasonable detention. The pre-9/11 standard of acceptable and reasonable administrative detention did not expand further than a few days. Moreover, the trend was pointing to a restriction of a maximum of 48 hours detention without judicial scrutiny. Compared to the indefinite detention at Guantanamo Bay, detention without trial for some weeks seems rather mild, although this was clearly prohibited before 9/11.

5. Concluding remarks

It was suggested that the terrorist attacks of 9/11 created a permanent 'new normalcy',[547] according to which the relation of state security and individual rights had to be readjusted.[548] This readjustment followed a 'Machiavellian logic of ends justifying means, of rights subordinated to security'.[549] Counterterrorism means included the 'crown jewel of emergency measures':[550] administrative detention without trial.

State practice and *opinio iuris* displayed by governments supported the contention that a 'new world'[551] with regard to individual rights was about to develop. In this development, old rules prohibiting detention without trial were contested by the actions of numerous governments. Their actions could potentially have modified old rules by way of norm changing through the process of international customary law.

However, a division within domestic legal systems emerged with time passing by. The judiciary increasingly objected to the executive's approach to detain terrorist suspects at will. Domestic courts started to refill the 'legal blackholes' dug by the executive. While the further development will, however, depend on external factors like the occurrence of terrorist attacks comparable to 9/11, a norm change has not been effected and a potential development towards change has been halted.

This trend is bolstered by recent developments. In February 2006 five independent experts[552] of the UN Commission on Human Rights issued a report bashing the detentions at Guantanamo Bay.[553] The experts expressly demanded the immediate

---

[547] Lawyers Committee for Human Rights (2003) i.
[548] Didion (2004).
[549] Freeman and Van Ert (2004) 519-20.
[550] Hor (2005) 277.
[551] Weisselberg (2005)
[552] These include Leila Zerrougui (Chairman Rapporteur of the Working Group on Arbitrary Detention), Leandro Despouy, (Special Rapporteur on the independence of judges and lawyers), Manfred Nowak, (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), Asma Jahangir (Special Rapporteur on freedom of religion or belief) and Paul Hunt (the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health).
[553] Commission on Human Rights, Situation of detainees at Guantánamo Bay UN Doc Future E/CN.4/2006/120.

shutdown of the detention facilities at Guantanamo Bay.[554] Furthermore, all detainees should either be released without further delay or tried expeditiously under criminal procedure.[555] Although the report has no legal significance, other states' reactions thereto indicated that detention without trial as counterterrorism measure is increasingly discredited and the US approach considered a breach of existing law.[556] The calls for immediate closure were reiterated by the British and the German government, as well as by UN Secretary General Kofi Annan and the European Parliament.[557]

Bibliography

Abramson, Bruce 'The CRC rights of babies and children: three key issues' (2004) Committee on the Rights of the Child, Day of General Discussion "Implementing Child Rights in Early Development" 17 September 2004, Palais Wilson, Geneva (rev.1), available at http://www.crin.org/docs/resources/treaties/crc.37/Bruce_Abramson.pdf (accessed on 12 February 2006)

Akehurst, Michael 'Custom as a source of international law' (1974-1975) 47 *British Yearbook of International L* 1

Aldrich, George H 'The Taliban, Al Qaeda and the determination of illegal combatants' (2002) 96 *American J of International L* 891

American Law Institute *Restatement of the law, third, foreign relations law of the United States* (1987) St Paul: The Institute

---

[554] Commission on Human Rights, Situation of detainees at Guantánamo Bay UN Doc Future E/CN.4/2006/120 para 96.
[555] Commission on Human Rights, Situation of detainees at Guantánamo Bay UN Doc Future E/CN.4/2006/120 para 95.
[556] 'Britischer Minister fordert Schließung von Guantanamo' *Spiegel Online* 17 February 2006, available at http://www.spiegel.de/politik/ausland/0,1518,401423,00.html (accessed on 17 February 2006).
[557] 'America's shame: torture in the name of freedom' *Spiegel Online* 20 February 2006, available at http://service.spiegel.de/cache/international/spiegel/0,1518,401899-3,00.html (accessed on 20 February 2006).

Amnesty International *United States of America: Amnesty International's concerns regarding post September 11 detentions in the USA*, AMR 51/044/2002 (2002) available at http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/$File/AMR5104402.pdf (accessed on 31 January 2006)

Bassiouni, Cherif M 'Human rights in the context of criminal justice: identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke J of Comparative & International L* 235

Benvenisti, Eyal 'National courts and the "war on terrorism"' in Bianchi, Andrea (ed) *Enforcing international law against terrorism* (2004) Oxford, Portland: Hart Publishing 307

Bhoumik, Arunabha 'Democratic responses to terrorism: a comparative study of the United States, Israel, and India' (2005) 33 *Denver J of International L & Policy* 285

Borelli, Silvia 'The treatment of terrorist suspects captured abroad: human rights and humanitarian law' in Bianchi, Andrea (ed) *Enforcing international law against terrorism* (2004) Oxford, Portland: Hart Publishing 39

Bossa, Solomy B and Mulindwa, Titus *The Anti-Terrorism Act, 2002 (Uganda): human rights concerns and implications*, paper presented to the International Commission of Jurists, 15 September 2004

Brierly, James L *The law of nations: an introduction to the international law of peace* 6ed (ed by CHM Waldock) (1963) Oxford: Clarendon Press

Brown, ED 'Law of the sea, history' in Bernhardt, Rudolf (ed) *Encyclopedia of public international law* (2000) vol 3 Amsterdam: North Holland 169

Brownlie, Ian *Principles of public international law* 6ed (2003) Oxford, New York: Oxford University Press

Btselem.org *Position paper on the proposed law: Imprisonment of Illegal Combatants* (2000), available at http://www.btselem.org/Download/2000_Hostages_Law_Position_Paper_Eng.doc (accessed on 4 February 2006)

Byers, Michael *Custom, power and the power of rules: international relations and customary international law* (1999) Cambridge: Cambridge University Press

Byers, Michael 'Power, obligation, and customary international law' (2001) 11 *Duke J of Comparative & International L* 81

Cainkar, Louise 'Introduction: global impacts of September 11' (2004) 24 *Comparative Studies of South Asia, Africa and the Middle East* 157

Camargo, Pedro Pablo 'Claim of "*amparo*" in Mexico: constitutional protection of human rights (1969-1970) 6 *California Western LR* 201

Capotorti, Francesco 'L'extinction et la suspension des traités' (1971) 134 III *Recueil des cours* 417

Cassese, Antonio 'Terrorism as an international crime' in Bianchi, Andrea (ed) *Enforcing international law against terrorism* (2004) Oxford, Portland: Hart Publishing 213

Chang, Nancy *Silencing political dissent: how post-September 11 anti terrorism measures threaten our civil liberties* 1ed (2002) New York: Seven Stories Press

Charlesworth, Hilary CM 'Customary international law and the Nicaragua Case'(1984-1987) 11 *Australian Yearbook of International L* 1

Cheng, Bin 'United Nations resolutions on outer space: "Instant" international customary law?' (1965) 5 *Indian J of International L* 23

Coccia, Massimo 'Reservations to multilateral treaties on human rights' (1985) 15 California Western International LJ 1

Cole, David and Dempsey, James X *Terrorism and the constitution: sacrificing civil liberties in the name of national security* (2002) New York: The New Press

Condorelli, Luigi and Naqvi, Yasmin 'The war against terrorism and *ius in bello*: are the Geneva Conventions out of date?' in Bianchi, Andrea (ed) *Enforcing international law against terrorism* (2004) Oxford, Portland: Hart Publishing 25

Cook, Helena 'Preventive detention – international standards and the protection of the individual' in Frankowski, Stanislaw and Shelton, Dinah (eds) *Preventive detention: a comparative and international law perspective* (1992) Dordrecht: M Nijhoff 1

Cornell, Timothy and Salisbury, Lance 'The importance of civil law in the transition to peace: lessons from the Human Rights Chamber for Bosnia and Herzegovina' (2001-2002) 35 *Cornell International LJ* 389

Davis, Tamil R and Lynn-Jones, Sean M 'City upon a hill' (1987) 66 *Foreign Policy* 20

De Preux, Jean *Commentary: III Geneva Convention relative to the treatment of prisoners of war* (1960) Geneva: International Committee of the Red Cross

De Visscher, Charles (trans by Percy E Corbett) *Theory and reality in public international law* 3ed (1968) Princeton, NJ: Princeton University Press

Dicey, Albert V *Introduction to the study of the law of the constitution* 10ed (1959) London: Macmillan

Dickson, Brice 'Law versus terrorism: can law win?' (2005) 10 *European Human Rights LR* 11

Didion, Joan 'Politics in the "new normal"America' (2004) 51 *New York Review of Books* no 16, 21 October 2004, available at http://www.nybooks.com/articles/117489 (accessed on 7 February 2006)

Dinstein, Yoram 'The right to life, physical integrity, and liberty' in Henkin, Louis (ed) *The International Bill of Rights: the Covenant on Civil and Political Rights* (1981) New York: Columbia University Press 114

Dworkin, Ronald 'The threat to patriotism' (2002) 49 *New York Review of Books* no 3, 28 February 2002, available at http://www.nybooks.com/articles/15145 (accessed on 15 January 2006)

Dyzenhaus, David 'The state of emergency in legal theory' in Ramraj, Victor V, Hor, Michael and Roach, Kent (eds) *Global anti-terrorism law and policy* (2005) Cambridge: Cambridge University Press 65

Fenwick, Mark 'Japan's response to terrorism post-9/11' in Ramraj, Victor V, Hor, Michael and Roach, Kent (eds) *Global anti-terrorism law and policy* (2005) Cambridge: Cambridge University Press 327

Flynn, Edward J 'Counter-terrorism and human rights: the view from the United Nations' (2005) 10 *European Human Rights LR* 29

Franck, Thomas M 'Criminals, combatants, or what? An examination of the role of law in responding to the threat of terror' (2004) 98 *American J of International L* 686

Freeman, Mark and Van Ert, Gibran *International human rights law* (2004) Toronto: Irwin Law

Gearty, Conor A '11 September 2001, counter-terrorism, and the Human Rights Act' (2005a) 32 *J of L and Society* 18

Gearty, Conor A 'Terrorism and human rights' (2005b) 10 *European Human Rights LR* 1

Gregory, Derek 'Palestine and the "war on terror"' (2004) 24 *Comparative Studies of South Asia, Africa and the Middle East* 185

Gross, Emanuel 'Human rights, terrorism and the problem of administrative detention in Israel: Does a democracy have the right to hold terrorists as bargaining chips?' (2001) 18 *Arizona J of International and Comparative L* 721

Gunning, Isabelle R 'Modernizing customary international law: the challenge of human rights' (1991) 31 *Virginia J of International L* 211

Hartman, Joan 'Working paper for the Committee of Experts on the article 4 derogation provision' (1985) 7 *Human Rights Q* 89

Hassan, Parvez 'The word "arbitrary" as used in the Universal Declaration of Human Rights: "illegal" or "unjust"?' (1969) 10 *Harvard International LJ* 225

Henkin, Louis/ Neuman, Gerald L/ Orentlicher, Diane F/ Leebron, David W *Human rights* (1999) New York: Foundation Press

Heymann, Philip B *Terrorism, freedom and security* (2003) (manuscript on file with author, pages referring to the manuscript)

Hoffman, Paul 'Human rights and terrorism' (2004) 26 *Human Rights Q* 932

Hor, Michael 'Law and terror: Singapore stories and Malaysian dilemmas' in Ramraj, Victor V, Hor, Michael and Roach, Kent (eds) *Global anti-terrorism law and policy* (2005) Cambridge: Cambridge University Press 273

Human Rights Watch 'Israel: opportunistic law condemned' (2002a) 7 March 2002, available at http://hrw.org/english/docs/2002/03/07/isrlpa3787_txt.htm (accessed on 4 February 2006)

Human Rights Watch *Presumption of guilt: human rights abuses of post-September 11 detainees* (2002b) HRW Report Vol 14 No 4 (G), available at http://www.hrw.org/reports/2002/us911/USA0802.pdf (accessed on 16 May 2005)

Human Rights Watch *In the name of counter-terrorism: human rights abuses worldwide*, A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights March 25 (2003), available at http://hrw.org/un/chr59/counter-terrorism-bck.pdf (accessed on 6 February 2006)

Human Rights Watch *State of pain: torture in Uganda* (2004) HRW Report Vol 16 No 4 (A), available at http://hrw.org/reports/2004/uganda0404/uganda0304.pdf (accessed on 30 January 2006)

ICRC (ed by Henckaerts, Jean-Marie and Doswald-Beck, Louise) *Customary international humanitarian law* (2005) Cambridge, New York: Cambridge University Press

Ipsen, Knut *Völkerrecht: ein Studienbuch* 4ed (1999) München: CH Beck

Jacobs, Francis G 'The European Convention on Human Rights' in Bernhardt, Rudolf and Jolowicz, John A (eds) *International enforcement of human rights: reports submitted to the Colloquium of the International Association of Legal Science, Heidelberg, 28-30 August 1985* (1987) Berlin, New York: Springer Verlag 31

Jacobs, Francis G and White, Robin CA *The European convention on human rights* 2ed (1996) Oxford: Clarendon Press

Jayawickrama, Nihal *The judicial application of human rights law: national, regional and international jurisprudence* (2002) Cambridge: Cambridge University Press

Jimeno-Bulnes, Mar 'After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples' (2004) 10 *European LJ* 235

Juwana, Hikmahanto 'Indonesia's anti-terrorism law' in Ramraj, Victor V, Hor, Michael and Roach, Kent (eds) *Global anti-terrorism law and policy* (2005) Cambridge: Cambridge University Press 295

Kelsen, Hans *Reine Rechtslehre* 2ed (1962) Wien: Verlag Franz Deuticke

Kirgis, Frederic L 'Custom on a sliding scale' (1987) 81 *American J of International L* 146

Klug, Heinz 'The rule of law, war, or terror' (2003) 2003 *Wisconsin LR* 365

Korkelia, Konstantin 'New challenges to the regime of reservations under the International Covenant on Civil and Political Rights' (2002) 13 *European J of International L* 437

Langille, Benjamin 'It's "instant custom": how the Bush Doctrine became law after the terrorist attacks of September 11, 2001' (2003) 26 *Boston College International and Comparative LR* 145

Lawyers Committee for Human Rights *Assessing the new normal: liberty and security for the post-September 11 United States* (2003), available at www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf (accessed on 6 February 2006)

Mahomed, Ismael 'Preventive detention and the rule of law' (1989) 106 *South African LJ* 546

Mariner, Joanne 'Indefinite detention on Guantanamo' (2002a) *Find Law's Writ*, 28 May 2002, available at http://writ.findlaw.com/mariner/20020528.html (accessed on 9 January 2006)

Mariner, Joanne 'Indefinite detention of terrorist suspects' (2002b) *Find Law's Writ*, 10 June 2002, available at http://writ.findlaw.com/mariner/20020610.html (accessed on 9 January 2006)

Martinez, Jenny 'Detention of suspected terrorists: balancing security and human rights' (2004) Research paper, Stanford Law School, available at http://www-leland.stanford.edu/group/sccn/general/Detention%20of%20Suspected%20Terrorists.doc (as of 5 December 2005)

Matheson, Michael J 'The United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 *American University J of International L & Policy* 419

McDonald, Neil and Sullivan, Scott 'Rational interpretation in irrational times: the third Geneva Convention and the "war on terror"' (2003) 44 *Harvard International LJ* 301

Mégret, Frédéric '"War"? Legal Semantics and the Move to Violence' (2002) 13 *European J of International L* 361

Meron, Theodor *Human rights and humanitarian norms as customary law* (1989) Oxford: Clarendon Press

Moeckli, Daniel 'The US Supreme Court's "enemy combatant" decisions: a "major victory for the rule of law"?' (2005) 10 *J of Conflict & Security L* 75

Ncube, Welshman 'Investigative detention distinguished from preventive detention: a distinction without a difference?' (1987) 5 *Zimbabwe LR* 247

Neuman, Gerald L 'Comment, counter-terrorist operations and the rule of law' (2004) 15 *European J of International L* 1019

Neier, Aryeh 'The military tribunals on trial' (2003) 50 *New York Review of Books* no 17, 17 November 2003, available at http://www.nybooks.com/articles/15122 (accessed on 12 February 2006)

Nowak, Manfred *UN Covenant on Civil and Political Rights: CCPR commentary* (1993) Kehl: NP Engel

Nyerere, Julius K *Freedom and unity: Uhuru na umoja: a selection from writings and speeches, 1952-65* (1967) London: Oxford University Press

Oraá, Jaime *Human rights in states of emergency in international law* (1992) Oxford: Clarendon Press

Otty, Tim and Olbourne, Ben 'The US Supreme Court and the "war on terror": *Rasul* and *Hamdi*' (2004) 9 *European Human Rights LR* 558

Ouguergouz, Fatsah *The African charter of human and peoples' rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) The Hague, New York: Kluwer Law International

Perkins, Jared '*Habeas corpus* in the war against terrorism: *Hamdi v. Rumsfeld* and citizen enemy combatants' (2004-2005)19 *Brigham Young University J of Public L* 437

Peter, Chris Maina 'Incarcerating the innocent: preventive detention in Tanzania' (1997) 19 *Human Rights Q* 113

Ramraj,Victor V, Hor, Michael and Roach, Kent 'Postscript: some recent developments' in Ramraj, Victor V, Hor, Michael and Roach, Kent (eds) *Global anti-terrorism law and policy* (2005) Cambridge: Cambridge University Press 625

Rehman, Javaid *International human rights law: a practical approach* (2003) Harlow, New York: Longman

Rehnquist, William H *All the laws but one: civil liberties in wartime* 1ed (1998) New York: Alfred A Knopf

Rieter, Eva 'ICCPR Case law on detention, the prohibition of cruel treatment and some issues pertaining to the death row phenomenon' (2002) 1 *J of the Institute of Justice & International Studies* 83

Roach, Kent 'Canada's response to terrorism' in Ramraj, Victor V, Hor, Michael and Roach, Kent (eds) *Global anti-terrorism law and policy* (2005) Cambridge: Cambridge University Press 511

Roberts, Anthea 'Righting wrongs or wronging rights? The United States and human rights post-September 11' (2004) 15 *European J of International L* 721

Ross, James 'Jurisdictional aspects of international human rights and humanitarian law in the war on terror' in Coomans, Fons and Kamminga, Menno T (eds) *Extraterritorial application of human rights treaties* (2004) Antwerp, Oxford: Intersentia 9

Roth, Kenneth 'The law of war in the war on terror' (2004) 83 *Foreign Affairs* (online version, pages not numbered), available at http://www.foreignaffairs.org/20040101facomment83101/kenneth-roth/the-law-of-war-in-the-war-on-terror.html (accessed on 4 February 2006)

Sassòli, Marco 'The status of persons held in Guantanamo under international humanitarian law' (2004) 2 *J of International Criminal Justice* 96

Schulhofer, Stephen J *The enemy within: intelligence gathering, law enforcement, and civil liberties in the wake of September 11* (2002) New York: The Century Foundation Press

Schulhofer, Stephen J 'Checks and balances in wartime: American, British and Israeli experiences' (2004) 102 *Michigan LR* 1906

Shapiro, Steven R 'The role of the courts in the war against terrorism: a preliminary assessment' (2005) 29 *Fletcher Forum of World Affairs* 103

Shelton, Dinah ''´The legal status of the detainees at Guantanamo Bay: innovative elements in the decision of the Inter-American Commission on Human Rights of 12 March 2002' (2002) 23 *Human Rights LJ* 13

Simma, Bruno 'Reciprocity' in Bernhardt, Rudolf (ed) *Encyclopedia of public international law* (2000) vol 4 Amsterdam: North Holland 29

Smith, Rhona KM *Textbook on international human rights* (2005) Oxford, New York: Oxford University Press

Spanger, Hans-Joachim *Die Wiederkehr des Staates: Staatszerfall als wissenschaftliches und entwicklungspolitisches Problem* (2002) HSFK-Report

1/2002, Hessische Stiftung Friedens- und Konfliktforschung, available at http://www.hsfk.de/downloads/rep0102.pdf (accessed 12 February 2006)

Stern, Brigitte 'Custom at the heart of international law' (2001) 11 *Duke J of Comparative and International L* 89

Steyn, Johan 'Guantanamo Bay: the legal blackhole' (2004) 53 *International & Comparative LQ* 1

Strossen, Nadine 'Conservatives and Liberals unite to conserve liberty and security' in Goldberg, Danny, Goldberg, Victor and Greenwald, Robert (eds.) *It's a free country: personal freedom in America after September 11* (2002) New York: RDV Books 52

Taft, William H, IV 'The law of armed conflict after 9/11: some salient features' (2003) 28 *Yale J of International L* 319

The President of the United States of America 'The National Security Strategy of the United States Of America, September2002' (2003) 24 *Human Rights LJ* 135

Thomas, Philip A 'Emergency and anti-terrorist powers: 9/11: USA and UK' (2003) 26 *Fordham International LJ* 1193

Uhler, Oscar M and Coursier, Henri *Commentary: IV Geneva Convention relative to the protection of civilian persons in time of war* (1958) Geneva: International Committee of the Red Cross

Vierucci 'Prisoners of war or protected persons *qua* unlawful combatants? The judicial safeguards to which Guantanamo Bay detainees are entitled' (2003) 1 *J of International Criminal Justice* 284

Walker, Clive 'Prisoners of war all the time' (2005) 10 *European Human Rights LR* 50

Warbrick, Colin 'The European response to terrorism in age of human rights' (2004) 15 *European J of International L* 989

Wedgwood, Ruth 'Countering catastrophic terrorism: an American view' in Bianchi, Andrea (ed) *Enforcing international law against terrorism* (2004) Oxford, Portland: Hart Publishing 103

Weisselberg, Charles D 'The detention and treatment of aliens three years after September 11: a new new world?' (2005) 38 *University of California Davis LR* 815

Wilde, Ralph 'Legal "black hole"? Extraterritorial state action and international treaty law on civil and political rights' (2005) 26 *Michigan J of International L* 739

Yin, Tung 'The role of article III courts in the war on terrorism' (2004-2005) 13 *William & Mary Bill of Rights J* 1037

Table of Cases

A v Australia, No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997)

A v Secretary of State of the Home Department [2005] 2 AC 68 (HL)

Abbasi v Secretary of State for Foreign and Commonwealth Affairs (2002) EWCA Civ 1598

Adolfo Drescher Caldas v Uruguay, No 43/1979, UN Doc CCPR/C/OP/2 at 80 (1990)

Aksoy v Turkey (1997) 23 EHRR 553

Al Odah v US, Brief for Petitioners (2004) WL 96764

Al Odah v US, 321 F 3d 1134 (CA DC 2003)

Al Shammeri v US, Civil action no 02-CV-0828 (CKK) (D DC 2004) Declaration of James R Crisfield Jr

Alvarez-Machain v US, 331 F 3d 604 (9th Cir 2003)

Amnesty International and Others v Sudan (2000) African Human Rights LR 297 (ACHPR 1999)

Anglo-Norwegian Fisheries Case (UK v Norway) 1951 ICJ Rep 116

Asylum Case (Columbia v Peru) 1950 ICJ Rep 266

Braden v 30th Judicial Circuit Court of Kentucky, 93 S Ct 1123 (1973)

Brogan v UK (1989) 11 EHRR 117

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) 1986 ICJ Rep 14

Castillo Petruzzi et al case, judgment of 30 May 1999 [1999] IACHR

Charkaoui v Canada (Minister of Citizenship and Immigration) 2004 FCA 421

Ciulla v Italy (1991) 13 EHRR 346

Commission Nationale des Droits de l'Homme et des Libertes v Chad (2000) African Human Rights LR 66 (ACHPR 1995)

County of Riverside v McLaughlin, 111 S Ct 1661 (1991)

Daniel Monguya Mbenge v Zaire, No 16/1977, UN Doc CCPR/C/OP/2 at 76 (1990)

Delia Saldias de Lopez v Uruguay, No 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984)

Fox, Campbell and Hartley v UK (1991) 13 EHRR 157

Greek Case Report of the European Commission of Human Rights (1969) 12 Yearbook of the European Convention on Human Rights 1

Guzzardi v Italy (1981) 3 EHRR 333

Hamdi v Rumsfeld, 296 F 3d 278 (4th Cir Va 2002)

Hamdi v Rumsfeld, 243 F Supp 2d 527 (E D Va 2002)

Hamdi v Rumsfeld, 316 F 3d 450 (4th Cir Va 2003)

Hamdi v Rumsfeld, 337 F 3d 335 (4th Cir 2003).

Hamdi v Rumsfeld, 124 S Ct 2633 (2004)

Hamdi v Rumsfeld, agreement (ED Va 17 September 2004) (No 2:02CV439), available at http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html (accessed on 4 February 2006)

Hanft v Padilla, Supreme Court, Order in pending case, 05A578 (Order list US 546) 4 January 2006

Hiber Conteris v Uruguay, No 139/1983, UN Doc CCPR/C/OP/2 at 168 (1990)

Hugo van Alphen v The Netherlands, No 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990)

In re Guantanamo Detainee Cases, 355 F Supp 2d 443 (D DC 2005)

Johnson v Eisentrager, 70 S Ct 936 (1950)

Lawless v UK (1979-80) 1 EHRR 15

Legality of the threat or use of nuclear weapons (United Nations) Advisory Opinion (1996) ICJ Rep 226

Lilian Celiberti de Casariego v Uruguay, No 56/1979, UN Doc CCPR/C/OP/1 at 92 (1984)

Lotus Case (France v Turkey) [1927] PCIJ 3

Marab v IDF Commander in the West Bank, HC 3239/02, 57(2) PD 349

Monja Jaona v Madagascar, No 132/1982, UN Doc CCPR/C/OP/2 at 161 (1990)

North Sea Continental Shelf Cases (FR Germany v Denmark and the Netherlands) 1969 ICJ Rep 3

Padilla v Hanft, 423 F 3d 386 (4th Cir 2005)

Paul Kelly v Jamaica, No 253/1987, UN Doc CCPR/C/41/D/253/1987 at 60 (1991)

Prosecutor v Tadić (IT-94-1-A) Appeals chamber, Judgment of 15 July 1999

Public Committee Against Torture v Israel, HCJ 5100/94, 53(4) PD 817

Rasul v Bush, 215 F Supp 2d 55 (D DC 2002)

Rasul v Bush, Brief Amicus Curiae of International Law Expert in Support of the Petitioners (2003) WL 22429202

Rasul v Bush, Brief for the respondents (2004) WL 425739 (US)

Rasul v Bush, 124 S Ct 2686 (2004)

Re Charkaoui 2005 FC 248

Rumsfeld v Padilla, 124 S Ct 2711 (2004)

Soering v UK, (1989) 11 EHRR 439

Sunday Times v UK (1979-80) 2 EHRR 245

Superintendent, Massachusetts Correctional Institution at Walpole v Hill, 105 S Ct 2768 (1985)

US v Hassoun, et al, case no 04-60001-CR (SD Fl 2005) (Indictment)

US v Noriega, 808 F Supp 791 (SD Fla 1992)

William Eduardo Delgado Páez v Colombia, No 195/1985, UN Doc CCPR/C/39/D/195/1985 (1990)

Winterwerp v The Netherlands (1979-80) 2 EHRR 387

Zharzhevski v Prime Minister, HC 1635/90, 48(1) PD 749

Legislation

Anti-Terrorism Act, 2002 (Uganda)

Anti-terrorism, Crime and Security Act 2001 (UK)

Anti-Terrorism Law no 15/2003 (Indonesia)

Authorization for Use of Military Force, Joint resolution to authorize the use of United States armed forces against those responsible for the recent attacks launched against the United States, 18 September 2001, Pub L No 107-40, 115 Stat 224 (2001)

Constitution of the Republic of Uganda, adopted 22 September 1995

Immigration and Refugee Protection Act, RSC 2001, c 27 (Canada)

Incarceration of Unlawful Combatants Law, 5762-2002 (Israel)

INS Interim rule No 2171-01, 66 Fed Reg 48334-01, 48335 (2001)

Presidential Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, 66 Fed Reg 57833 (2001)

Special Immigration Appeals Commission Act 1997 (UK)

Terrorism Act 2000 (UK)

The Human Rights Act 1998 (Designated Derogation) Order 2001 No 3644 (UK)

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub L 107-56, 115 Stat 272 (2001)

Treaties

African Charter on Human and Peoples' Rights, 27 June 1981, 21 *ILM* 58, entered into force on 21 October 1986

Agreement between the United States and Cuba for the lease of lands for coaling and naval stations, 23 February 1903, available at http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm (accessed on 12 February 2006)

American Convention on Human Rights, 22 November 1969, 9 *ILM* 673, entered into force 18 July 1978

Charter of the United Nations, 59 Stat. 1031 (1945)

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, Rome, 4.XI 1950, *European Treaty Series* No 5

General Framework Agreement for Peace in Bosnia & Herzegovina, 14 December 1995, 35 *ILM* 89

Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, entered into force 21 October 1950

Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, entered into force 21 October 1950

Geneva Convention III relative to the Treatment of Prisoners of War of 12 August 1949, entered into force 21 October 1950

Geneva Convention IV relative to the Protection of Civilian Persons in Time of War of 12 August 1949, entered into force 21 October 1950

International Covenant on Civil and Political Rights of 16 December 1966, 6 *ILM* 368, entered into force 23 March 1976

Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, signed 8 June 1977, entered into force 7 December 1979

Statute of the International Court of Justice, 59 Stat 1031 (1945)

Vienna Convention on the Law of Treaties (1969) 8 *ILM* 679

Other Documents

Commission on Human Rights, Situation of detainees at Guantánamo Bay UN Doc Future E/CN.4/2006/120

Council of Europe, Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers at its 804th meeting (11 July 2002)H (2002) 4 Strasbourg 11 July 2002

Council of Europe 'United Kingdom derogation under Art.15 ECHR / Public Emergency after 11 September' 2001 (2001) 22 *Human Rights LJ* 465

Council of Europe, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, *Report: Lawfulness of detentions by the United States in Guantánamo Bay* (2005) Doc 10497, available at http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10497.htm (accessed on 10 February 2006)

Human Rights Committee, Concluding observations of the Human Rights Committee: Colombia UN Doc CCPR/CO/80/COL (2004)

Human Rights Committee, Concluding observations of the Human Rights Committee: Israel UN Doc CCPR/CO/78/ISR (2003) (Concluding Observations/Comments)

Human Rights Committee, Concluding observations of the Human Rights Committee: Peru (25/07/96), UN Doc CCPR/C/79/Add.67; A/51/40

Human Rights Committee, Concluding observations of the Human Rights Committee: Sri Lanka UN Doc CCPR/CO/79/LKA (2003)

Human Rights Committee, General Comment No 29 states of emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001)

Human Rights Committee, General Comment No 8, Article 9, UN Doc HRI\GEN\1\Rev.1 at 8 (1994)

Inter-American Commission on Human Rights (IACHR) 'Decision on request for precautionary measures (Detainees at Guantanamo Bay, Cuba)' 12 March 2002 (2002) 41 *ILM* 533

International Committee of the Red Cross (ICRC) 'States party to the Geneva Conventions and their Additional Protocols Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977' 12 April 2005, available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf (as of 24 January 2006

Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights UN Doc E/CN.4/2003/G/73

Office of the Press Secretary, Declaration of National Emergency by Reason of Certain Terrorist Attacks, by the President of the United States of America, 14

September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html (accessed on 12 January 2006

President Bush 'Statement by the President in His Address to the Nation' 11 September 2001, available at www.whitehouse.gov/news/releases/2001/09/20010911-16.html (as of 24 March 2006)

Report of the Committee on the Judiciary, H Rept 109-174, part 1 to accompany HR 3199, USA PATRIOT and Terrorism Prevention Act of 2005, 18 July 2005 (2005)

Secretary of State for the Home Department *Counter-terrorism powers: reconciling security and liberty in an open society: a discussion paper* Cm 6147 (2004), available at) http://www.archive2.official-documents.co.uk/document/cm61/6147/6147.pdf (accessed on 12 January 2006)

Study of the United Nations High Commissioner for Human Rights *Protection of human rights and fundamental freedoms while countering terrorism* (2004) UN Doc A/59/428

UK House of Commons, Constitutional Affairs Committee *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* 7th Report of Session 2004-05 Vol I (2005)

UN Commission of Human Rights, Working Group on Arbitrary Detention, *Civil and political rights, including the question of torture and detention*, E/CN.4/2003/8, 16 December 2002

Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 at 71 (1948)

US Department of Defense 'News Briefing, Secretary Rumsfeld and Gen Myers' 11 January 2002, available at

http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html (accessed 30 January 2006

US Department of Defense, Combatant Status Review Tribunals, fact sheet, , 7 July 2002, available at http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf (accessed on 12 February 2006)

US Department of Defense, Combatant Status Review Tribunals summary, available at http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf (accessed on 13 February 2006)

US Department of Defense, Order establishing Combatant Status Review Tribunals, 7 July 2004, available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (accessed on 12 February 2006)

US Department of Justice, Office of the Inspector General *The September 11 detainees: a review of the treatment of aliens held on immigration charges in connection with the investigation of the September 11 attacks* (2003) Special Report available at http://www.usdoj.gov/oig/special/03-06/full.pdf (accessed on 27 December 2005)

United States of America 'Response of the United States to request for precautionary measures – detainees in Guantanamo Bay, Cuba' 15 April 2002 (2002) 41 *ILM* 1015

Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention UN Doc E/CN.4/2003/8

Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention UN Doc E/CN.4/2004/3

Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention UN Doc E/CN.4/2005/6

Working Group on Arbitrary Detention, Response of the Government of the United States UN Doc E/CN.4/2004/3